BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY THE TIMARU DISTRICT COUNCIL

IN THE MATTER OF	The Resource Management Act 1991 (**RMA** or **the Act**)
AND	
IN THE MATTER OF	Hearing of Submissions and Further Submissions on the Proposed Timaru District Plan (**PTDP** or **the Proposed Plan**)
AND	
IN THE MATTER OF	Submissions and Further Submissions on the Proposed Timaru District Plan by **Waipopo Huts Trust and Te Kotare Trust**

CASEBOOK FOR WAIPOPO HUTS TRUST AND TE KOTARE TRUST REGARDING HEARING E

Dated: 30 January 2025

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IN THE ENVIRONMENT COURT OF NEW ZEALAND
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2022] NZEnvC 162

IN THE MATTER OF	an appeal under clause 14 of Schedule 1 of the Resource Management Act 1991
BETWEEN	MIDDLE HILL LIMITED
	ENV-2020-AKL-000048
	Appellant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Environment Judge MJL Dickey Environment Commissioner RM Bartlett Environment Commissioner A Gysberts
Hearing:	29 June – 3 July 2021
Last Case Event:	Submissions in reply 16 July 2021
Appearances:	P Fuller for Middle Hill D Hartley and A Buchanan for Auckland Council B Carruthers for GP (Turnstone Capital) Limited B McCullough for Auckland Transport A Devine for Warkworth Properties Ltd
Date of Decision:	26 August 2022
Date of Issue:	26 August 2022

DECISION OF THE ENVIRONMENT COURT

A: The appeal is upheld to the extent that the zoning for the Middle Hill site is changed to General Business.

B: Amendments to Plan Change 25 are to be made as follows:

(i) Traffic rules are to be made in terms of those agreed between parties and described in paragraph [88];

(ii) Provision is to be made for a 3 metre landscape planting area as described in paragraph [204];

A draft order is to be filed for the Court's consideration.

C: Costs are reserved. Any application is to be made within 15 working days and responses filed within a further five working days.

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REASONS

A. Zoning

[1] Middle Hill Limited seeks a 'live' zoning for its land, a 3.5 hectare block located adjacent to the junction of the existing State Highway 1 and the Pūhoi-Warkworth Motorway (soon to become State Highway 1), just to the north of Warkworth. Middle Hill has aspirations to develop residential and commercial buildings at the site. It is presently zoned Future Urban.

[2] A Future Urban zone discourages anything but rural activities to occur. Middle Hill's land was part of a larger area for which re-zoning was sought by Turnstone Capital in Plan Change 25. In the Commissioners' decision, some of that area was declined the zoning sought and Middle Hill's land was so excluded. Middle Hill has appealed that exclusion.

[3] Middle Hill proposes a Business - Mixed Use zone (**Mixed Use**) for its land. Failing that, it proposes a Business – General Business zone (**General Business**). Auckland Council opposes a Mixed Use zone, preferring that the land be zoned General Business or remain as Future Urban.

Mixed Use

[4] In essence Middle Hill seeks a Mixed Use zone for its land because:

(a) it provides for a wide range of business activities including live/work options;

(b) it will address a present shortfall in housing capacity in Warkworth;

(c) it is the most feasible zoning option; and

(d) it will provide a high quality amenity outcome.

[5] The Council asserts:

(a) that the Mixed Use zone is too enabling of residential activities;

(b) there is sufficient residential-zoned land in Warkworth, including through recent plan changes, to meet short to medium term demand;1

(c) there is little certainty that it, as compared to General Business, will enable employment opportunities; and

(d) as to feasibility, Middle Hill's approach is individual-landowner focussed.

General Business

[6] The Council supports a General Business zoning because:

(a) there is a limited availability of land in Warkworth that is suited to businesses that would provide employment opportunities. This land is suitable because of its proximity to State Highway 1, relatively flat terrain and proximity to other live-zoned business land;

(b) it would support the location of large-format retail development and generate lesser adverse effects on the Warkworth Town Centre, the future proposed Plan Change 25 Local Centre and surrounding Mixed Use land, rather than the smaller format retail enabled in the Mixed Use zone;2

(c) it gives better effect to the Regional Policy Statement than does Mixed Use as there is more certainty it will enable employment opportunities as envisaged in the Auckland Plan 2050 (Auckland

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[1] Council opening submissions at [3.6] and [3.8].
[2] Council opening submissions at [3.9].

Plan).

[7] Middle Hill opposes a General Business zoning because:

(a) it provides primarily for large-format retail, which is not commercially viable on its site if developed alone as it is a lower-value use and the land development costs are high;

(b) there are suitable areas for General Business within the remaining area of Future Urban zoned land (800 hectares) that could be zoned when demand is more evident;

(c) the land cannot be properly serviced for roading in the short-term because the Western Link Road will not be completed for some time;

(d) it cannot achieve the "mixed, vibrant community" that the Civil family (the Middle Hill landowner) wish to develop on the site as a legacy.3

Warkworth Properties Ltd, GP (Turnstone Capital) Limited

[8] Warkworth Properties called no evidence, and had a minimal role in the proceedings. It supported a Mixed Use zone for the site. GP (Turnstone Capital) Limited took no part in the hearing.

Auckland Transport

[9] Auckland Transport was concerned about the potential traffic effects of a live zoning of the land.

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[3] Middle Hill's opening submissions at [1.5].

B. Issues

[10] In determining the key issue, which is the appropriate zoning for the land, we need to decide what parts of the statutory planning documents apply, and the extent to which they and the Auckland Plan and the Warkworth Structure Plan guide our decision. We then need to determine the importance of the following:

(a) the need to provide housing and business land capacity in Warkworth and more housing choice;

(b) the need to provide for more employment opportunities in Warkworth;

(c) the 'economic feasibility' for Middle Hill of a Mixed Use, General Business or Future Urban zone of the land.

[11] Before addressing these matters we provide some background to the appeal, the planning and zoning relating to it having some complexity.

C. Background to Plan Change 25

[12] Land affected by Plan Change 25 was zoned Future Urban and identified by the Council as being an area suitable for urbanisation. That is because of its proximity to existing urban development in Warkworth, to State Highway 1, the new Warkworth motorway connection (immediately to the north) and the recently approved Matakana Link Road; limited rural production potential; proximity to established and proposed social infrastructure; and the absence of significant landscape, ecological or cultural values. It was identified in the Council's Future Urban Land Supply Strategy, July 2017 as being *development ready* from 2022.[4]

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[4] Robert Bruce Scott, who provided planning evidence for the Council, at [18].

[13] In accordance with the Council's Future Urban Land Supply Strategy, the Council prepared the Warkworth Structure Plan in June 2019 (**Structure Plan**). That plan set out a pattern of land use and a network of transport and other infrastructure for the 1,000 hectares of Future Urban zoned land around Warkworth. It was intended to be the foundation to inform future plan changes to re-zone the land.

[14] Key high-level features of the Structure Plan were described to us. They include:

(a) ecological and stormwater areas set aside from any built urban development;

(b) new residential areas across the Future Urban zone to enable around 7,500 dwellings and offer a range of living types from spacious sections around the fringe to more intensive dwellings, such as townhouses and apartments, around the new small centres and along public transport routes;

(c) the protection of Warkworth's local and rural character through various measures including provisions to protect the bush-clad Warkworth Town Centre set against the backdrop of the Mahurangi River and retaining the Morrison's heritage orchard as a rural feature of the town;

(d) identification of new employment areas comprising land for new industry (e.g. warehousing, manufacturing, wholesalers, repair services) and land for small centres (e.g. convenience retail, local offices, restaurants/cafés). The existing Warkworth Town Centre was to remain the focal point of the town.

[15] The Structure Plan identified infrastructure to support the future land uses, including reference to a walking and cycling network, a potential southern interchange on Ara Tūhono (Pūhoi to Warkworth Motorway)

(south-facing ramps only), a public transport network and other utilities.

[16] Within the area surrounding and including the Middle Hill land, the Structure Plan foreshadowed a mixture of zones; Residential – Single House, Residential – Mixed Housing Suburban and Residential – Mixed Housing Urban, with Middle Hill's corner site noted as Business – Light Industry zone.

[17] Due to delays in the preparation of the Structure Plan, Turnstone Capital lodged its private plan change for land around the northern margins of Warkworth, within which Middle Hill's land is located. Plan Change 25 was notified in May 2019 (before the Council's Structure Plan was released).

The area in which Plan Change 25 sits

[18] Plan Change 25 is a private plan change covering 99 hectares of land north of Warkworth, key features of which are as follows:

(a) the land is within the Rural Urban Boundary, and at the time of the notification was zoned Future Urban in the Auckland Unitary Plan;

(b) to the north lies the designated Pūhoi to Warkworth Motorway (**SH 1**), which is under construction;

(c) to the east is the existing SH 1 (referred to now as **Great North Road**);

(d) adjacent to the Middle Hill land subject to appeal is the Sullivan land comprising 2.23 hectares (at 27 SH 1) and the Catholic Diocese land of 1.5 hectares (at Part Lot 18023) – both sites are zoned Future Urban;

(e) the Hudson and Sanderson Road areas to the east comprise light industrial activities;

(f) on the corner of Hudson Road and Great North Road is a new Pak'n'Save complex under construction on land zoned General Business (5.5 hectares). Further along, one side of Hudson Road is zoned Light Industrial while the opposite (east) side is zoned Residential-Single House zone;

(g) to the south is a Light Industrial zone;

(h) to the west is a large area of Future Urban zoned land;

(i) across the road from the plan change area and to the north is an area of Light Industry zoned land known as "Showgrounds-Goatley Road", the Plan Change 40 residential area (which zones 102 hectares of land from Future Urban zone and some Light Industry zone to a range of residential, business, open space and rural zones) and the Matakana Link Road.

[19] In the general area is also an area of land known as Kowhai Falls (on Woodcocks Road) zoned Light Industry, and for which a resource consent was granted authorising 15,400 m^2 of large-format retail, among other land uses.[5]

[20] Access to the Plan Change 25 area is available from Hudson and Falls Roads to the south, and will eventually be provided off Great North Road when the Western Link Road is built. The Middle Hill site does not have direct access to any road. We refer to the Western Link Road again later in this decision.

Request for Plan Change 25

[21] Turnstone Capital initially lodged its request to reflect the Warkworth Structure Plan, but sought significant amendments through the submission

[5] This consent was due to lapse in October 2021. We were advised that an application to extend the lapse period has been made.

process.

[22] The request that was determined by the Council's hearing Commissioners involved the application of five zones, namely:

- Residential – Single House;
- Residential – Mixed Housing Suburban;
- Residential – Mixed Housing Urban;
- Business – Neighbourhood Centre; and
- Business – Light Industry.

[23] The key differences between the notified and decision versions were that the latter included Business-Mixed Use rather than Business-Light Industry, more extensive use of Mixed Housing Suburban and Mixed Housing Urban zones rather than the Single House zone, and a larger Local Centre rather than a Neighbourhood Centre. A precinct and sub-precinct were proposed to secure key outcomes such as the Western Link Road, the wastewater network, ecological outcomes, transportation connectivity, and high-quality urban design.

Commissioners' decision on Plan Change 25

[24] The Commissioners' decision largely confirmed the requested zoning layout but determined that a Future Urban zone should remain on certain land, including the Middle Hill land. Further, an area of Recreation zone land was included. The decision to retain the land as Future Urban largely related to a lack of evidence or rationale supporting a business zoning.[6] The Council did not adopt Plan Change 25 at the cl 25(2) stage (prior to the

[6] Commissioners' decision, dated 18 March 2020, at [86].

Commissioners' decision) – that has relevance to our findings on the National Policy Statement on Urban Development 2020 which we come to later.

[25] The decision was appealed by Turnstone Capital including the decision to retain the Future Urban zoning over a part of its land. The Council reached agreement with Turnstone Capital on its appeal which resulted in the live-zoning of certain of the Future Urban land to a Residential – Mixed Housing Suburban zone. This did not include the Middle Hill land.

[26] The Middle Hill appeal relates to the Future Urban land adjoining SH 1. The appeal originally included adjoining Future Urban land owned by the Sullivans and the Catholic Diocese, but these parties have not involved themselves in the plan change process and are now excluded from the appeal. Middle Hill seeks that its 3.5 hectare block be re-zoned to Mixed Use.[7] This land, at the north-eastern edge of the plan change area, is known as Area D. Area D is separated from Great North Road by a highway maintenance facility owned by Waka Kotahi NZ Transport Agency, likely to be there for at least 30 years.[8] The location of Middle Hill's land is shown in **Annexure 1**, together with the zoning of the rest of the Plan Change 25 land.[9] As we have said, this land has no direct access to Great North Road, to the new motorway, or to the Western Link Road.

Relevant statutory framework

[27] It was agreed that the mandatory requirements for plan preparation are as summarised in *Long Bay-Okura Great Park Society Inc v North Shore City*

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[7] There are two small areas adjoining the Middle Hill land to the north and adjoining to the west that are zoned Future Urban but not within the Plan Change 25 area and are not subject to the appeal. This land is subject to a designation of the NZ Transport Agency: 6769 (the construction, operation and maintenance of a state highway (Ara Tūhono-Pūhoi to Wellsford Road of National Significance: Pūhoi to Warkworth section)).

[8] Notes of Evidence (**NOE**), page 156, line 19.

[9] The decision on Plan Change 25, 18 March 2020 Appendix 3.

Council,[10] with the updates made in *Colonial Vineyard Ltd v Marlborough District Council*.[11]

[28] The matters at issue relate to the most appropriate zoning for the land. No new objectives or policies are proposed, and most of the Plan Change 25 precinct provisions have been settled through consent orders.

[29] In summary, therefore, the relevant statutory requirements for the plan change provisions include:[12]

(e) whether they are designed to accord with and assist the Council to carry out its functions for the purpose of giving effect to the Resource Management Act 1991 (**RMA** or **Act**);[13]

(f) whether they accord with Part 2 of the RMA;[14]

(g) whether they give effect to the regional policy statement;[15]

(h) whether they give effect to a national policy statement;[16]

(i) whether they have regard to the Auckland Plan and the Structure Plan (being strategies prepared under another Act);[17] and

(j) whether the rules have regard to the actual or potential effects on the environment including, in particular, any adverse effect.[18]

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[10] *Long Bay-Okura Great Park Society Inc v North Shore City Council* NZEnvC Auckland A78/08, 16 July 2008 at [34].
[11] *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17].
[12] Council opening submissions at [5.4] and [5.5].
[13] RMA, ss 31 and 74(1)(a).
[14] RMA, s 74(1)(b).
[15] RMA, s 75(3)(c).
[16] RMA, s 75(3).
[17] RMA, s 74(2)(b).
[18] RMA, s 76(3).

[30] Under s 32 of the Act we must also consider whether the provisions are the most appropriate way to achieve the purpose of the plan change and the objectives of the Auckland Unitary Plan by:

(a) identifying other reasonably practicable options for achieving the objectives;[19] and

(b) assessing the efficiency and effectiveness of the provisions in achieving the objectives, including by:[20]

i. identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for:

- economic growth that are anticipated to be provided or reduced;[21] and
- employment that are anticipated to be provided or reduced;[22] and

ii. if practicable, quantifying the benefits and costs;[23] and

iii. assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.[24]

[31] Also relevant is s 290A of the RMA, which requires us to have regard to the Council's decision.

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[19] RMA, s 32(1)(b)(i).
[20] RMA, s 32(1)(b)(ii).
[21] RMA, s 32(2)(a)(i).
[22] RMA, s 32(2)(a)(ii).
[23] RMA, s 32(2)(b).
[24] RMA, s 32(2)(c).

[32] Before addressing the evidence, we set out details from relevant statutory documents, because they provide a context to the evidence.

D. Statutory Plans

National Policy Statement

[33] The National Policy Statement on Urban Development 2020 (**NPS-UD**) is a document to which the plan change must give effect. The NPS-UD has the broad objective of ensuring that New Zealand's towns and cities are well-functioning urban environments that meet the changing needs of New Zealand's diverse communities. Its emphasis is to direct local authorities to enable greater land supply and ensure that planning is responsive to changes in demand, while seeking to ensure that new development capacity enabled by councils is of a form and in locations that meet the diverse needs of communities and encourage well-functioning, liveable urban environments. It also requires councils to remove overly restrictive rules that affect urban development outcomes in New Zealand cities.[25] There was disagreement between the parties as to which provisions of the NPS-UD applied. This related to the extent to which a decision on the merits of a private plan change request on appeal[26] is a planning decision for the purposes of the NPS-UD. *Planning decision* is defined to include a decision on a "district plan or proposed district plan".[27]

[34] The issue was recently considered by a different division of this Court in an appeal relating to another private plan change: *Eden-Epsom Residential Protection Society Inc v Auckland Council* (***Eden-Epsom***).[28] For reasons which follow, we agree with the Court's findings in that case and determine that, for

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[25] RB Scott at [127].
[26] Under cl 29(7) of Schedule 1 of the RMA.
[27] National Policy Statement on Urban Development 2020, cl 1.4 Interpretation.
[28] *Eden-Epsom Residential Protection Society Inc v Auckland Council* [2021] NZEnvC 082. We record that the decision has been appealed.

the purposes of this decision, only Objectives 2, 5 and 7 and Policies 1 and 6 are relevant.

Objectives 2, 5 and 7

[35] Objectives 2 and 5 require that planning decisions improve housing affordability by supporting competitive land and development markets (Objective 2) and that planning decisions relating to urban environments and future development strategies take into account the principles of the Treaty of Waitangi (Objective 5). Objective 7 is that local authorities have robust and frequently updated information about their urban environments and use it to inform planning decisions.

Policies 1, 2, 3 and 6

[36] Policy 1 requires that planning decisions contribute to well-functioning urban environments that, as a minimum, have or enable a variety of homes, have or enable a variety of sites that are suitable for different business sectors, have good accessibility for all people between housing, jobs, community services, natural spaces and open spaces, support and limit possible adverse effects on the competitive operation of land and development markets, support reductions in greenhouse gas emissions and are resilient to the likely current and future effects of climate change.

[37] Policy 6 requires that when making planning decisions decision-makers have particular regard to certain matters, including: the planned urban built form anticipated by planning documents that have given effect to the NPS-UD; that the planned urban built form in those documents may involve significant changes to an area; the benefits of urban development that are consistent with well-functioning urban environments; any relevant contribution that will be made to meeting the requirements of the NPS-UD to provide or realise development capacity; and the likely current and future

effects of climate change.

[38] The Council submitted that only limited parts of Policy 6 apply, being those parts that relate to the benefits of urban development and the effects of climate change (Policy 6(c) and (e)). Counsel submitted the other parts of the policy do not apply, as they rely on other provisions of the NPS-UD having been implemented in the Auckland Unitary Plan. We were advised that integrated Council workstreams are currently under way to implement those provisions in the Unitary Plan, with a view to plan changes being notified in 2022. We accept the Council's submissions on this point – our reasons follow.

[39] For completeness, we note Middle Hill's reference to and reliance on Policies 2 and 3 of the NPS-UD. Policy 2 anticipates that local authorities[29] provide, at all times, at least sufficient development capacity to meet expected demand for housing and business land over the short, medium, and long term.[30] Policy 3 requires that regional policy statements and district plans enable certain building heights and density of urban form. Middle Hill also placed significant weight on commercial feasibility issues when assessing business land development capacity. However, the Council considers that feasibility in relation to business land capacity is not relevant to assessment under the NPS-UD.[31]

Reasons for focussing only on Objectives 2, 5 and 7 and Policies 1 and 6

[40] In determining the jurisdictional question, the Court in *Eden-Epsom* considered the relevant definition of "planning decisions" and "district plan" or "proposed district plan". It determined that there was no policy reason to

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[29] Being those which have all or part of an urban environment within their district or region.

[30] Under the NPS-UD, cl 1.4: "short term means within the next 3 years"; "short-medium term means within the next 10 years"; "medium term means between 3 and 10 years"; "long term means between 10 and 30 years".

[31] Refer cl 3.29(1)(b) of NPS-UD.

draw a distinction between Council-initiated plan changes and private plan change requests in the context of the NPS-UD. It concluded that some provisions of the NPS-UD could be considered in a "planning decision" on the merits of a private plan change request, including an appeal to the Environment Court.

[41] In determining what provisions may be considered in a planning decision, the Court interrogated Part 2 of the NPS-UD – Objectives and Policies. It noted that reference to "planning decisions" among the eight objectives and eleven policies is quite limited, being found in only Objectives 2, 5 and 7 and Policies 1 and 6.

[42] The Court referred to Part 4 of the NPS-UD (Timing), noting it as important. It includes a two-year timeframe for Tier 1 local authorities to implement Policies 3 and 4 of the NPS-UD, noting that the Council is busy with "workstreams" on these and other matters that must inform community consultation and the promulgation of plan changes to the Auckland Unitary Plan under Schedule 1 of the RMA. The timing for promulgation is no later than 20 August 2022. The Court noted that these steps would logically be accomplished under sub-part 6 "Intensification in Tier 1 urban environments", which requires very precise activity by the local authority of identifying, by location, the building heights and densities required by Policy 3 – with information about these things to be disseminated when notification of plan changes occur.

[43] The Court held that it is not required "and will not be giving effect in this case to Objectives and Policies in the NPS-UD that are not requiring "planning decisions" at this time". Finally, it acknowledged the promulgation and operative status of the NPS-UD overall but stated that it cannot pre-judge, let alone pre-empt, Schedule 1 processes yet to be undertaken by the Council

in its implementation of it.[32]

[44] Counsel for Middle Hill submitted that Policy 3 (and to a lesser extent Policy 2) is relevant to our consideration of this appeal. Having referred to authority that supported his submission that this Court is not bound by its previous decisions, Mr Fuller argued there are good reasons why we should not follow *Eden-Epsom*.

[45] First, Mr Fuller submitted that:

(a) had Parliament intended that Policy 3 would only apply to provisions in the NPS-UD that refer to "planning decisions", it would have said so;

(b) the Court in *Eden-Epsom* did not consider the relevance of Policy 3 under cl 1.3(1)(a) of the NPS-UD; namely that it applies to all local authorities that have all or part of an urban environment within their district;

(c) it is difficult to see what relevance Policy 3 would have outside the context of planning decisions. In other words, if it does not apply to a decision on a plan change the question must be as to what decision it would be relevant;

(d) the trigger for giving effect to the NPS-UD is not when certain implementation steps in subpart 6 have been completed – rather it is the coming into force of the NPS-UD from 20 August 2020; and

(e) it is difficult to see how a determination of a private plan change appeal is pre-judging or pre-empting an imminent separate Schedule 1 process.

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[32] *Eden-Epsom* at [29]-[30].

[46] He also submitted that the policy intention of the NPS-UD is that up-zoning is required to give effect to the minimum heights that have been defined in proximity to centres and corridors, noting that the only exemptions are where there are heritage or other matters that must be specifically identified and the qualifications are relatively limited.

[47] It is clear to us that the Court in *Eden-Epsom* had Objective 3 and Policy 3 in mind when considering the relevance of the NPS-UD. In fact, it was about Policy 3 (and 4) that reference was made to Part 4 and the timeframes for implementation. Those timeframes make it clear that specific policies referred to must be complied with in accordance with the timetable. Policies 3 and 4 are specifically referenced.

[48] We endorse the finding that the Court cannot pre-judge or pre-empt Schedule 1 processes required to be initiated by the NPS-UD and emphasise that the Act requires a local authority to amend plans to give effect to the NPS-UD. We accept the Council's submission that, when read as a whole, the NPS-UD allocates some tasks to local authorities to undertake. Amending policy statements and district plans to enable the matters set out in Policy 3 is one of those tasks. The analysis needs to be undertaken on a region-wide basis. The same must apply to the qualifying matters in Policy 4, which allow policy statements and plans to modify the Policy 3 requirements only to the extent necessary to accommodate a qualifying matter in that area.

[49] Respectfully, we adopt the findings of the Court in *Eden-Epsom* and determine that the only provisions of the NPS-UD on which we must focus are Objectives 2, 5 and 7 and Policies 1 and 6(c) and (e).

Regional Policy Statement

Urban growth and form

[50] The Regional Policy Statement at Chapter B1 sets out the issues of regional significance, which include urban growth and form. Chapter B2 – Urban growth and form sets out objectives and policies that relate to urban growth and form (B2.2), a quality built environment (B2.3), residential growth (B2.4) and commercial and industrial growth (B2.5).

Quality compact urban form

[51] Objectives at B2.2.1 assumed some relevance in the hearing. Objective B2.2.1(1) is directed at ensuring a quality compact urban form that enables greater productivity and economic growth, better use of existing infrastructure, improved and more effective public transport and greater social and cultural vitality, among others. A further objective addresses development capacity.

Sufficient land

[52] The objectives are supported by policies at B2.2.2. Middle Hill also placed some emphasis on Policy B2.2.2(1), which requires that sufficient land be included within the Rural Urban Boundary that is appropriately zoned "to accommodate at any one time a minimum of seven years' projected growth in terms of residential, commercial and industrial demand … after allowing for any constraints on subdivision, use and development of land".

Quality built environment

[53] Objectives at B2.3 and related policies focus on a quality built environment where subdivision use and development respond to the intrinsic qualities and physical characteristics of the site and area, reinforce the

hierarchy of centres and corridors, contribute to a diverse mix of choice and opportunity for people and communities, maximise resource and infrastructure efficiency and are capable of adapting to changing needs and respond and adapt to the effects of climate change.

[54] Objectives at B2.4 address residential growth and policies cover intensification, residential neighbourhoods and character and affordable housing.

[55] Objectives at B2.5 address commercial and industrial growth focussing on meeting current and future demands and location, among others.

District Plan

[56] Three zones could be applied to the Middle Hill land: Mixed Use, General Business and Future Urban.

Business zones

[57] The same general objectives and policies apply to all business zones in the Unitary Plan. There are also specific provisions for each zone.

General objectives and policies

[58] The general objectives focus on a strong network of centres; the centres are reinforced as focal points for the community. They promote the distribution of business activity in locations and at a scale and form that provides for the community's social and economic needs, improves community access to goods, services, community services and opportunities for social interaction, and manages adverse effects on the environment, including on infrastructure and residential amenity.

[59] The general policies reinforce the function of the city centre, metropolitan centres and town centres as the primary location for commercial activity. Policies enable an increase in the density, diversity and quality of housing in the centre zones and Mixed Use zone. They require development to be of a certain quality and design, among others.[33]

[60] We were assisted by Mr Scott's detailed description of the functions of the zones. He said:[34]

> [Mixed Use] is part of the range of business zones in the AUP and fits within the hierarchy of business zones that range from Business-City Centre Zone with its focus on the city centre and being a centre for business and learning, innovation, entertainment, culture and urban living to the … Business-Heavy and Light Industry Zones with their focus on employment, manufacturing and production. A hierarchy of business zones is provided for, based on the scale and function of the various centres and community that it serves (or is intended to serve) and this ranges from the City Centre through to metropolitan centres, town centres and smaller local and neighbourhood centres.

Mixed Use

[61] The zone description notes that the zone is typically located around centres and along corridors served by public transport. It acts as a transition area, in terms of scale and activity, between residential areas and the Business-City Centre zone, Business-Metropolitan Centre zone and Business-Town Centre zone. It also applies to areas where there is a need for a compatible mix of residential and employment activities. It provides for residential activity as well as predominantly smaller-scale commercial activity that does not cumulatively affect the function, role and amenity of

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[33] H14.2 Objectives and H14.3 Policies contained in the General Business zone chapter – note there are the same general objectives and policies across all business zones.
[34] RB Scott at [42].

centres. It does not specifically require a mix of uses on individual sites or within areas.

[62] It is a zone that is often applied to existing brownfield areas where revitalisation and intensification is being promoted to support existing centres and provide a transition to establish residential areas. Further, as has occurred with Plan Change 25 land, it has also been applied in a limited way to greenfield sites adjoining business centre zones.[35] It is also applied to existing arterial corridors (and public transport networks) where the zone provides a linkage with existing traditional centres with established public transport routes.

[63] There was agreement between the planners that the Mixed Use zone provides a high degree of flexibility for a wide range of business activities as well as for residential development. There was also agreement that the zone has a focus on high quality design and amenity outcomes, which is reflected in the policies for the zone.

[64] In Warkworth, the Mixed Use zone has been applied to land areas immediately adjoining the Warkworth Town Centre (immediately west and east) and includes a mix of industrial activities, lower density residential activities and, to a lesser extent, business activities that have established in existing residential neighbourhoods.[36] A Mixed Use zone is already provided in the Plan Change 25 area adjacent to the Local Centre.

General Business

[65] This zone provides almost exclusively for business and employment activities. The zone description states that it provides for business activities from light industrial to limited office, large-format retail and trade suppliers.

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[35] RB Scott at [44].
[36] RB Scott at [49].

Large-format retail is preferred in centres, but it is recognised that this is not always possible, or practical. The description also notes that these activities are appropriate in the General Business zone only when they do not adversely affect the function, role and amenity of the Business-City Centre zone, Business-Metropolitan Centre zone and Business-Town Centre zone.

[66] The Unitary Plan notes that the application of the General Business zone within Auckland is limited, but that it is an important part of the Plan's strategy to provide for growth in commercial activity and manage the effects of large-format retail. Small retail activities in the zone are limited, as the presence of those activities in combination with large-format retail can effectively create an unplanned centre. Residential activity is not envisaged due to the potential presence of light industrial activities and the need to preserve land for appropriate commercial activities.

[67] The zone is located primarily in areas close to Business-City Centre, Business-Metropolitan Centre and Business-Town Centre zones or within identified growth corridors, where there is good transport access and exposure to customers.[37] In terms of location, there is a contrast between the Mixed Use zone, which is directed to be "in close proximity to" or "within a close walk" of the City/Town centre zone and the General Business zone which is to be "adjacent or close" to those centres "or in other areas where appropriate".

Future Urban

[68] This zone is applied to land that has been identified as being suitable for urbanisation through a range of methods, including structure planning, spatial plan growth assessments and future infrastructure planning assessments. It is a form of hybrid zoning containing elements of urban and

[37] The zone's locational criteria are outlined in the Plan (Objective H14.3(7) and Policy H14.3(15)).

rural techniques and methods. In terms of the zone statement, it is clear that it is an urban zone, and that it relates to land that has been included in the Rural Urban Boundary for urban development, but is also like a rural zone because its provisions are intentionally restrictive, so that urbanisation can be planned for and progressed in a cohesive and coordinated manner.[38]

Management plans and strategies prepared under other Acts

[69] We were referred to several plans and strategies during the hearing. Section 74(2)(b)(i) of the Act requires the Court to have regard to management plans and strategies prepared under other Acts. Ms Hartley submitted that the Auckland Plan and the Structure Plan are relevant to our determination of the appeal, being strategies prepared under other Acts. While Mr Fuller accepted the relevance of the Auckland Plan, he raised an issue as to the extent to which the Structure Plan should be considered.

[70] He submitted that, while the Structure Plan is relevant to our determination of the appeal, little weight should be placed on it because it had not been put through the special consultative procedure as noted in the Commissioners' decision. Ms Hartley submitted that the approach taken by the Commissioners should not be followed because the Council undertook consultation on the Structure Plan in accordance with the principles in s 82 of the Local Government Act 2002 and was not required to use the special consultative procedure in s 83. We accept the Council's submission and determine that the Structure Plan is a document to which we must have regard.

[71] Mr Fuller also argued that the Structure Plan should be given little weight because it is not a document to which Plan Change 25 must give effect, contrasting with the NPS-UD and the Regional Policy Statement. He also

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[38] Objective H18.2(1) and Objective H18.2(3).

observed that there are no objection and appeal rights in a structure planning exercise.

[72] We find that the Structure Plan is a document which had the benefit of comprehensive public consultation and community engagement. It is also informed by numerous technical reports.[39] It provides a strategic vision to guide future development in Warkworth. It is a document that is relevant to our determination of the appeal.

The Auckland Plan 2050

[73] We were referred to the Auckland Plan. It is the Council's spatial plan, required to be prepared and adopted under ss 79 and 80 of the Local Government (Auckland Council) Act 2009 as a comprehensive and effective long-term (20-30 year) strategy for Auckland's growth and development. It is a relevant statutory planning document for the preparation of the Regional Policy Statement.

[74] It provides a vision of what Auckland should look like over the next 30 years, including an urban footprint that includes significant redevelopment and intensification in areas that are already developed; and for newly established communities in the Future Urban areas.[40]

[75] The spatial strategy envisages a multi-nodal model within the urban footprint, with the City Centre continuing to be the focus of Auckland's business, tourism, educational, cultural and civic activities. Significant growth is planned in Albany, Westgate and Manukau, including their catchments. The satellite towns of Warkworth and Pukekohe act as rural nodes. They are intended to service their surrounding rural communities, while also being connected to urban Auckland through state highways, and in the case of

[39] Refer Appendices 1-4 of the Structure Plan.
[40] RB Scott at [143].

Pukekohe by rail, and will support significant business and residential growth.[41]

[76] For Warkworth, the Auckland Plan states that "significant future employment growth is anticipated alongside residential growth". For its future development, the Plan states:[42]

> Significant residential and employment growth is expected over the next 30 years, with around 1100 hectares earmarked as future residential and business land.
>
> …
>
> The development of quality transport links within Warkworth, as well as between Warkworth, Northland and the rest of Auckland will be critical to supporting the town's future growth.
>
> The Pūhoi – Warkworth Road of National Significance, Ara Tūhono, will be completed in late 2021 as will the Matakana Link Road.
>
> These projects will take through-traffic and freight away from the town centre and improve travel times to and from Warkworth.
>
> Development will be staged over the next 20 years, reflecting demand and the provision of the necessary infrastructure upgrades.
>
> A Structure Plan for Warkworth will refine the staging and timing of development and will identify the mix and location of housing, employment, retail, commercial and community facilities.

[77] An outline of the staging and timing of development notes the area covered by Plan Change 25 as being made available for development from

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[41] RB Scott at [144].
[42] Auckland Plan 2050, pages 257-258.

2022.

[78] Middle Hill drew attention to those aspects of the Auckland Plan that addressed housing, noting the references to accelerating the construction of homes and securing affordable homes for all, among others (Directions 2 and 3). We were referred to Direction 4, which requires the provision of sufficient public places and spaces that are inclusive, accessible and contribute to urban living.

[79] We were also referred to the Development Strategy which addresses growth by re-development and intensification, establishing new communities and the creation of flexible and adaptable business areas. Mr Fuller acknowledged that there is a need to provide for new business areas.

[80] Mr Scott noted that the Plan Change 25 land is an important component of the future development strategy, bringing the land adjoining Great North Road (including Ara Tūhono) into effect. He noted that the Auckland Plan emphasises employment growth and this is an important outcome for the sustainability of Warkworth as a satellite town.[43]

Warkworth Structure Plan

[81] The need for structure planning in Warkworth is identified in the Auckland Plan. We have previously provided an overview of the Structure Plan (in our section on Background to Plan Change 25). The Structure Plan sets out a pattern of land uses and the supporting infrastructure network for the Future Urban zone land around Warkworth. It has been prepared in the context of the existing town of Warkworth and seeks to weave the new development areas into the fabric of the existing urban area.

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[43] A satellite town is a rural town which has the potential to function semi-independently from the main urban area, providing a full range of services and employment opportunities to the wider rural area. See the Auckland Plan 2020, page 300.

[82] The Structure Plan has a strong focus on retaining Warkworth as a rural community while also enabling significant residential and business growth opportunity. Warkworth Town Centre is intended to remain the focal point for retail, office, community and civic space for Warkworth, even with the development of the Future Urban zone.[44]

[83] The Structure Plan identified the Middle Hill land as being Light Industry;[45] and that zoning was supported by the Council at the hearing of Plan Change 25. The Commissioners, however, found there was insufficient information or certainty to live-zone the land. In any event, there is no opportunity for it to be zoned Light Industry as the appeal does not seek that relief.

[84] However, the Structure Plan sets out a pattern of land uses and infrastructure identified for industrial zones in the vicinity of and including Middle Hill's site.[46] Those sites sit on the fringes of residential areas.

[85] Against the background of those documents we turn to address the merits of the zoning options.

E. Evidence received

Owner, engineering, ecological and project manager

[86] While we received evidence from a range of witnesses, Middle Hill's case at the hearing emphasised economic, urban design and planning considerations as providing support for the Mixed Use zone. For completeness, we record that we received evidence on other matters from:

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[44] Structure Plan summary statement, page 17.

[45] The Light Industry zone is described in the District Plan at H17.1 Zone description as a zone which "anticipates industrial activities that do not generate objectionable odour, dust or noise. This includes manufacturing, production, logistics, storage, transport and distribution activities…"

[46] No land for General Business or Mixed Use is identified in the Structure Plan.

- Matthew Civil, who represented Middle Hill. He spoke of his family's history on the Plan Change 25 land and the adjacent land. He wants to see a visually pleasing development suited to the interface between the motorway and residential zones;

- Chris Freer on geotechnical issues which was unchallenged;

- Stephen Brent Rankin, who considers there are no infrastructure services or flooding constraints to development. He also prepared an estimate of the costs associated with forming a building platform and access to the proposed Mixed Use zone area – which informed Mr Thompson's feasibility analysis. This evidence was unchallenged;

- Nicola Robyn Kerr to the effect that there is no ecological reason for the site not to be developed. Her evidence was unchallenged;

- Wesley John Edwards on traffic engineering. His evidence was unchallenged as agreement had been reached on a proposed rule that we address below;

- Josephine Grierson, the company's Project Manager. Her evidence was that:

  (a) a high value-added, multi-level development will be required to unlock the site's potential, that General Business is not commercially feasible;

  (b) the uncertainty around timing of full access to the site means a flexible zoning is required;

  (c) the Western Link Road is shown as an easement on the subdivision plan submitted to Council and will service the

Middle Hill residential land, and an extension and bridge (not on the Western Link Road alignment) are planned to service the site;[47]

(d) she has been in discussions with potential business owners to obtain expressions of interest in locating on the site, noting the main interest to date has been from a rest home operator.

[87] Most of the proposed rules in the Plan Change 25 area are beyond challenge. The only issues remaining relate to the proposed zoning of the Middle Hill land. On effects:

(a) no issue was taken with the ecological evidence relating to freshwater habitats, with the Council accepting that a zoning change to Mixed Use or General Business would not result in any significant adverse effects;

(b) with the proposed amendments made to the precinct provisions, the Council accepted that the traffic and transportation effects are avoided, remedied or mitigated under either live zoning scenario;

(c) no issues were raised on geotechnical or infrastructure grounds;

(d) issues remained on transportation, economic and urban design effects of the proposed zoning.

Traffic/transportation

[88] Leading into the hearing there were still live issues regarding the traffic and transportation effects of the plan change. Those effects were resolved between the parties and amended rules put forward for the Court's consideration. They related to permitted peak period traffic generation

[47] Middle Hill's reply submissions at [2.32].

associated with the Middle Hill land resulting in amendments to Table I552.6.5.1 Threshold for development – transport. Amendments were also proposed to I552.9 Special information requirement to state what *peak period* means for the purposes of the transport assessment. We accept those amendments.[48]

Economics

[89] In addressing economic effects, economic and property market evidence was provided by Adam Jeffrey Thompson, and peer review evidence by Dr Philip James McDermott for Middle Hill. We received economic evidence from Derek Richard Foy, who was called by Auckland Council. They caucused and provided a joint witness statement.

Challenge to evidence

[90] Before addressing the economics evidence we address an issue which arose in relation to Mr Foy's evidence. In the hearing, Middle Hill challenged Mr Foy's qualifications to give evidence as an economic expert. Mr Fuller submitted there was cause in this case to set aside the opinions expressed by Mr Foy on the basis that he is not qualified or experienced to offer opinion evidence that is of assistance to the Court. He gave an example: because he has never undertaken a feasibility assessment, it was not appropriate for him to criticise Mr Thompson's feasibility assessment; and he is not qualified to criticise the evidence of Dr McDermott and Mr Thompson.

[91] We were reminded of the Evidence Act 2006 provisions regarding the admissibility of expert evidence. Section 4(1) defines expert and expert evidence as follows:

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[48] We were assisted by evidence from Martin John Peake (Auckland Transport and Auckland Council) and Wesley John Edwards (Middle Hill) on traffic and transportation matters.

> **Expert** means a person who has specialised knowledge or skill based on training, study, or experience.
>
> **Expert evidence** means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion.

[92] Under s 25(1) of the Act, expert evidence is admissible if the fact finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding, or in ascertaining any fact that is of consequence to the determination of the proceeding.

[93] In this case, Mr Foy has a BSc in geography and an LLB from the University of Auckland. He describes himself as having over 20 years' consulting and project experience. His experience includes retail analysis, assessment of demand and markets, the form and function of urban economies, the preparation of forecasts, and evaluation of outcomes and effects. He also referred to the application of these specialties and studies throughout the country across most sectors of the economy, including assessments of retail, urban form, landmark, commercial and service demand, and housing.

[94] Ms Hartley submitted that, while Mr Foy does not have any specialised economics qualification, his evidence demonstrates specialised knowledge and experience in the field of economics and that his evidence is, accordingly, admissible.

[95] On the matter of his expertise, the Council referred us to the decision of the High Court in *Commercial Centres (Tikipunga) Ltd v Landplan Holdings Ltd*[49] in 1988 as illustrative of the situation where the evidence of an expert

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[49] *Commercial Centres (Tikipunga) Ltd v Landplan Holdings Ltd* HC Auckland CL49/88, 5 August 1988 at 5.

witness without formal qualifications was nevertheless held to be admissible. Barker J held:

> Questions of the lack of formal qualifications of Mr Tansley must of course go to the weight to be placed on his evidence. However, I am prepared to recognise that there is a topic which can be the subject of expertise, namely, the evaluation of a need for and impact of new retail developments, including supermarket developments.

[96] We are satisfied that Mr Foy has the experience necessary to have provided substantial help to us in understanding Mr Thompson's and Dr McDermott's evidence. For completeness, we note Mr Fuller's reference to a case in which Mr Foy was involved, *Bunnings Ltd v Queenstown Lakes District Council*.[50] That case is unrelated to that which is before us, and is therefore of no assistance.

[97] Finally, in support of his submission that an expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise, Mr Fuller provided examples where he said Mr Foy had not done that. Those examples were all in the nature of criticism of the evidence Mr Foy gave insofar as it differed from that of Middle Hill's witnesses. Differences between witnesses are not unusual. We conclude that there is no partiality in Mr Foy's evidence or the answers he gave to the Court and to counsel in the hearing.

Urban design

[98] On matters of urban design, evidence was provided by Lisa Kate Mein, an urban designer and planner called by the Council, and by Ian Colin Munro, an urban designer called by Middle Hill. They caucused and prepared a joint witness statement. We address their evidence in Section F.

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[50] *Bunnings Ltd v Queenstown Lakes District Council* [2019] NZEnvC 59.

Planning

[99] Three planners provided evidence: Hamish Firth for Middle Hill, Robert Bruce Scott for the Council and Katherine Julie Dorofaeff for Auckland Transport. Ms Dorofaeff focussed on transport-related matters and the issue between the parties as to addressing transportation effects of the urbanisation of the Plan Change 25 area.

[100] Mr Firth and Mr Scott addressed the three zoning options with reference to the functions of each of those zones. Mr Firth preferred a Mixed Use zone and Mr Scott a General Business zone. They completed caucusing and prepared a joint witness statement. The joint witness statement recorded that the reasons for their disagreement are contained in their statements of primary evidence but are also very influenced by the economics and design evidence each has relied on to understand what specific land use activities should or should not be enabled on the site.[51]

[101] We now consider the economic and urban design evidence.

F. Whether the proposed zoning rules have regard to actual and potential effects

Site context

[102] There is a Pak'n'Save and a second large-format retail store (3,000-4,000 m^2) and a small number of smaller stores under construction on the General Business zoned part of the Foodstuffs site at the corner of Hudson Road and Great North Road.

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[51] Planners joint witness statement at [8].

[103] The Turnstone Capital local centre will develop as a circa 5,000-10,000 m^2 Local Centre that services the Plan Change 25 area.

[104] The Catholic Diocese and Sullivan sites are strategically located Future Urban zoned land at the entrance of the Plan Change 25 area and Warkworth more generally. The owners are not currently participating in the process of re-zoning, however Mr Thompson anticipates the sites may be re-zoned when the Auckland Unitary Plan is reviewed in around five years. He thinks it is likely that a zone which provides for business activities (Mixed Use or General Business) would ultimately be applied to these properties given their location, profile and adjacency to Pak'n'Save.

Need and feasibility

[105] Driving Mr Thompson's approach were his conclusions on two matters – the need for housing and commercial land in Warkworth, and the feasibility of the zoning from Middle Hill's perspective. We address each.

Capacity

[106] Mr Thompson noted that Warkworth is a fast-growing rural/service town. He noted that significant new investment in infrastructure and recent decisions on Plan Changes 25 and 40 will increase the availability of land and, in turn, population growth. He sees a need for additional residential and commercial land in Warkworth to meet minimum capacity requirements in the NPS-UD.

[107] There was a considerable amount of evidence addressing capacity. We have carefully considered the points made and our summary of those matters follows.

Residential

[108] The witnesses agreed that the Structure Plan estimated growth of approximately 300 dwellings per annum over the next 30 years. They disagreed on the rate of growth, with Mr Thompson describing that as a 'baseline growth scenario' only – because house price increases in Auckland had increased demand for lower cost peripheral locations such as Warkworth. As a result, he thought demand would increase up to 500 houses per annum being a 'high-growth scenario'. Dr McDermott considered that high but plausible.

[109] Based on his estimates, Mr Thompson estimated that the provision of housing would not meet the 'short-medium term' capacity requirements (within the next 10 years) of the NPS-UD. Dr McDermott accepts this conclusion.

[110] Mr Foy disagreed with the high growth scenario, noting for that to occur there would have to be very large areas of more dense residential activity than is currently anticipated or the spatial footprint of the Town has to be larger than currently enabled, given the Rural Urban Boundary constraints, or the Future Urban zone will be developed more quickly than the Council's 30 year horizon. He considered it more likely there will be a gradual ramping up of demand for dwellings in Warkworth as the market becomes aware of new supply. He concluded that there is sufficient residential zoned land in Warkworth to meet 'short-medium term' obligations under the NPS-UD.

Industrial

[111] The witnesses accepted that there is adequate supply of industrial land to provide for demand in the short (within the next three years) and medium (between three and ten years) terms. Dr McDermott noted that industrial

land supply has been limited in Warkworth for some time, but that it will be greatly eased by the release of lots in the Showgrounds-Goatley Road development across the highway from the Plan Change 25 area.

[112] The witnesses accepted that future demand for industrial land is likely to increase with the additional population in Warkworth. Mr Thompson estimated demand for an additional 2.3 hectares per annum under his 'baseline growth scenario', and 3.3 hectares per annum under the 'high-growth scenario'. He concluded that there is sufficient industrial land in Warkworth to meet the short-medium term needs, and no additional land was required.

[113] Mr Foy, while accepting that there is adequate supply in the short and medium terms, considered that an additional 57 hectares of industrial land may be required to be consistent with the vision in the Auckland Plan, which states that Warkworth will support significant business goals and that significant future employment growth is anticipated alongside residential growth; that as a satellite town it will have "the potential to function semi-independently from the main urban area".[52] That is despite the live zoned land at Showgrounds-Goatley Road.

[114] Mr Foy referred to the Warkworth Business Land Assessment (which he co-authored) that recommended there was strategic value in setting aside more rather than less industrial land now, given the factors that constrain where, in Warkworth, industrial zones could successfully establish (due to topography, proximity to existing residential activities and transport links). He noted that these constraints mean that accommodating industrial zones in Warkworth is challenging, one reason why the Structure Plan indicated that more industrial land is needed in addition to the land at the Showgrounds.

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[52] Auckland Plan 2050, pages 204 and 300.

Commercial

[115] The witnesses disagreed on commercial land capacity, with Mr Thompson concluding capacity would be reached in seven years under the 'baseline growth scenario' – which does not meet the short-term capacity requirements of the NPS-UD. Dr McDermott supported his conclusion. Mr Foy concluded that supply will be met for well in excess of 10 years, and closer to 30 years; further, that there is adequate short-term supply.

[116] The primary difference in opinion relates to estimates of commercial floor space demand – with Mr Thompson's estimate being considerably higher than Mr Foy's. Mr Foy identified various reasons, including a very large area of additional miscellaneous 'other' space that Mr Thompson estimates will be needed without explaining what that is. Further, he included childcare centres and community space – which Mr Foy considers should be excluded from the assessment of additional commercial floor space – as in many locations those activities are permitted or limited discretionary activities. Excluding those amounts of additional floor space leaves the demand projections relatively close.

[117] The witnesses agreed on vacant land estimates. Mr Foy noted that the requirements to provide sufficient development capacity to meet expected demand for retail and services activity in Business zones under the NPS-UD is very nearly met without the proposed Mixed Use zone on this site, or the new Local Centre or Mixed Use zone in the Plan Change 25 area.

Conclusion on capacity

[118] All economics witnesses made reference to the capacity requirements of the NPS-UD in their evidence – giving their opinion on the extent to which the housing and business capacity in Warkworth meets those requirements and also relying on the Regional Policy Statement's references to capacity. We

note that the NPS-UD includes, under the term "business" land, land within industrial and commercial zones.[53]

[119] We have already concluded that we are not obliged to ensure that the Plan Change gives effect to the NPS-UD in matters of housing or business capacity.

[120] Having said that, we note the requirements of the Regional Policy Statement for sufficient land to accommodate a minimum of seven years of projected growth in terms of residential, commercial and industrial demand. We consider that is relevant, but observe that the reference to capacity in the Regional Policy Statement is a region-wide estimate, and not one which requires that each town in the region meet that requirement.

[121] Even if we are wrong in our findings on the relevance of capacity under the NPS-UD, we note insofar as Warkworth is concerned that, even on Mr Thompson's high growth scenario figures, there is sufficient residential capacity in the short and medium term calculated with reference to land zoned for housing. For business we record that Mr Thompson and Mr Foy accept that there is adequate supply of industrial land to provide for demand in the short to medium term; and we accept Mr Foy's evidence that commercial land supply is well in excess of 10 and closer to 20 years, and that there is also an adequate short term supply.

[122] We caveat our conclusions by noting that the capacity requirements of both the NPS-UD and the Regional Policy Statement refer to region-wide capacity. We had no evidence on region-wide capacity.

[123] We conclude that there are no issues of capacity relating to housing or business land supply in Warkworth.

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[53] It also includes large-format retail zone; any centre, mixed use, or special purpose zone to the extent they allow business uses. See definition of "business land", cl 1.4.

Commercial feasibility of site development

[124] Middle Hill placed considerable reliance on commercial feasibility as justifying a Mixed Use zoning for the site.

[125] Mr Thompson's evidence addressed commercial feasibility in some detail. He referred to the NPS-UD and its reference to the Methodology for the Assessment of Housing Capacity. He referred to the definition of 'feasibility', which means that the capacity must be "… commercially viable to a developer based on the current relationship between costs and revenue". He also referred to the Regional Policy Statement Policy B2.2.2 which addressed development capacity and supply of land for urban development – "sufficient land … appropriately zoned to accommodate … a minimum of seven years' projected growth in terms of residential, commercial and industrial demand…"; and to Objective B2.4.1(6) – "sufficient, feasible development capacity for housing is provided". He translated that concept to the request for a Mixed Use zone on the site. Those provisions informed (in part) his assessment of feasibility.

[126] He assessed development costs and revenues of the site, noting that the site has very high development costs and that most zones do not provide sufficient revenue to be feasible. He identified only two zones that appear to be feasible, being Mixed Housing-Urban and Mixed Use. That is because they allow multiple level buildings – broadly three and five levels respectively – and it is the intensive use of the site that supports a higher land value. Multiple level buildings are either residential or office or Mixed Use (for example retail at grade with residential above). He noted that the site has high earthworks costs – $6.2M if the site is developed at the same time as the balance of the wider Middle Hill residential land and $9.3M if the site is developed out of sequence with that other development. He observed that both scenarios require bridge access, which has a cost of $3.5M. Those costs were not disputed in the hearing.

[127] Based on his analysis, Mr Thompson noted that the Council's zoning options of Light Industry (as indicated under the Structure Plan) or General Business, which was the Council's preferred zoning in this hearing, are both infeasible zoning options for the site. He considered those zones would result in the site remaining vacant and un-utilised over the long term and would be an inefficient use of the land and infrastructure resource.

[128] Dr McDermott agreed with Mr Thompson's conclusion that only the Mixed Housing-Urban and Mixed Use zones provide for viable use of the site.

[129] Mr Foy made a number of observations regarding Mr Thompson's feasibility analysis, noting first that feasibility is a consideration for development capacity under the NPS-UD but only for residential land. For business land the NPS-UD requires the capacity be suitable to meet the demands of different business sectors. He concluded that General Business is more suitable to meet demand than Mixed Use.

[130] Mr Foy also noted that a feasibility-based assessment is necessarily very site-specific and does not recognise how a site fits into the broader environment, and so commonly uses a very narrow scope of 'appropriateness'. He observed that the highest value for a particular piece of land (and therefore the zoning under which its development is most feasible) will usually tend to be one of a few zones, particularly those enabling retail activities, and in many locations, also residential activities. If highest and best use is a key factor, he notes there would be a broad distribution of high land value retail-enabled zones across all of Auckland and limited provision of lower land value zones such as industrial, rural or open space.

[131] He noted also that land values vary broadly across Auckland, and that variability makes the type of assessment undertaken by Mr Thompson at best indicative. Finally, he notes that such an assessment requires many assumptions to be made, and there are ways to reduce costs and therefore

make more types of zones feasible. He referenced the costs of earthworks as an example, noting those costs are influenced by the underlying assumption that a future development would wish to create a single building platform to enable as much developable land as practicable, maximising return to the landowner. In practice, he understood that a less expensive and lower yielding configuration could be pursued, and that would change the inputs to the assessment.

[132] Mr Thompson accepted that the NPS-UD does not require business land to be assessed in respect of its commercial feasibility when assessing capacity, but considered that that does not mean that commercial feasibility is not an important or helpful consideration for a plan change. He noted that if the site is too expensive to develop for industry or large-format retail, for example, then zoning for those uses would result in the site remaining vacant. For the site to be developed and the infrastructure and land resource utilised efficiently, the Middle Hill site requires a zone that enables a range of uses that are commercially feasible. Mr Thompson's opinion is that, taken as a whole, the RMA including s 31(1)(aa) – functions of a territorial authority to ensure capacity and s 32 – opportunities for economic growth and employment, and the NPS-UD establish that a key consideration is for land to be commercially feasible for development while recognising that absolute proof, in the absence of fully costed projects, is not realistic. He again referred to the Regional Policy Statement development capacity policies.

[133] Mr Fuller pointed to several decisions which addressed 'efficiency' and financial viability.[54] He placed some reliance on *Wallace Group*. The Court in that case preferred the zoning that would better enable efficient and effective development of the site without significantly disenabling those outcomes for the neighbouring land or other resources.

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[54] *Bunnings Ltd v Queenstown Lakes District Council* [2019] NZEnvC 59 and *Wallace Group Ltd v Auckland Council* [2018] NZEnvC 92.

[134] The Council submitted that zoning is concerned with district-wide sustainable management of resources, and referred to the High Court's decision in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*.[55] In that case, Mr Belgiorno-Nettis alleged that the Panel had failed to specifically address evidence about the development feasibility of certain land.[56] It was alleged that the land was unlikely to be capable of development in the foreseeable future, and so should not have been zoned Terrace Housing and Apartment Building. The Court stated:[57]

> … rather [the Council] is engaged in a higher level, more complex, forward looking exercise, that necessarily involves making very broad assumptions about potential patterns of development. That necessarily involves an assessment of (among other things) whether the zoning will enable the Council to discharge its functions under s 31 of the RMA, including the integrated management of effects of the use, development, or protection of land. Inevitably, there will be individual sites that may not be "likely" to utilise the development potential of a proposed rezoning… . There is no mandatory requirement on the part of the Council to be satisfied, when settling on a zone for an area, that the development potential is "likely" to be taken up by individual sites.

[135] We find the High Court's summary of the breadth of assessment required for zoning to be helpful.

[136] It is appropriate at this point to record Mr Scott's answers to questions

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[55] *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2020] NZHC 6. We record that this decision was recalled for other reasons by the decision *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2022] NZHC 1705. For similar discussion see *Northern Land Property v Thames-Coromandel District Council* [2021] NZEnvC 180 at [153] where the Court said "The most appropriate plan provisions are to be determined based on the very wide range of relevant considerations identified in the Act and in superior planning documents. People may then make their own decisions about what they may use or develop land for according to those planning documents and in light of their own calculations".

[56] At [99].

[57] At [101].

about zoning and feasibility. He stated that there needs to be a broad assessment as to whether the types of activities and development are appropriate on a particular area of land. There needs to be a consideration of wider regional and district drivers and what the community is thinking. Feasibility plays a role – there is no point in zoning land that cannot be effectively used for that purpose, such as a flood plain or unstable land; and that is an important part of the process. The level of detail required needs to be sufficient to determine whether the land is appropriate to enable those activities.[58]

[137] As to the assistance offered by a site-specific feasibility analysis, Mr Scott said that he did not think that is needed. He said there has been sufficient investigation for the land to be used for business activities, and the Structure Plan identified it as being Light Industry and has done that work. He does not think there needs to be a detailed feasibility study when land is going to be zoned to a certain zone that provides for a wide range of activities.[59] In response to a question asserting there is no evidence that would show that large-format retail or other general business activities are viable on the site, Mr Scott said "I don't think that needs to be done when you're zoning land…, it's a much broader test than that. Is it suitable for a wide range of business activities, and I think that's been satisfied".[60]

Conclusion on feasibility assessments

[138] Applying the above to the present case, it is our view that the feasibility assessment undertaken by Mr Thompson has limitations. It focusses only on the feasibility of the zoning and development of the site for the owner, and not at all on what is an appropriate zoning for the site from a district and regional perspective with reference to the patterns of development in the area, recent

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[58] NOE, page 345, line 17 – line 31.
[59] NOE, page 345, line 32 – page 346, line 10.
[60] NOE, page 347, line 32 – page 348, line 3.

plan changes, and the remaining Future Urban Zone.

[139] We accept the Council's submission that feasibility can change over time, and sometimes it is necessary to take a longer view of when it may be appropriate for development to occur. If highest and best use is a key factor during zoning decisions there would be a broad distribution of high land value, retail-enabled zones across Auckland and limited provision of lower land value zones such as industrial, rural or open space.

Zoning options

[140] The zoning options were analysed by the witnesses. Mr Thompson assessed the various zoning options with reference to conclusions he had reached on site-specific considerations, matters of housing and business capacity, best use and economic feasibility. We refer only to the zone options of Future Urban, Mixed Use and General Business as no others are possible under the appeal.

[141] Mr Thompson considers the land should be live-zoned Mixed Use or General Business. Mixed Use is his preferred option. Mr Foy considers the best available zone is General Business, but if the land were not to be rezoned General Business, he thinks it should remain Future Urban.[61]

Future Urban

[142] Mr Thompson and Mr Foy disagreed on the appropriateness of a Future Urban zone for the land.

[143] Mr Thompson noted that live zoning of the land from Future Urban would result in a net increase to economic activity and employment in

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[61] Mr Foy expressed support for a Business-Light Industry zoning in his evidence but noted that the appeal limits zoning options to MUZ or GBZ.

Warkworth. He referred to current investment in public infrastructure in Warkworth, being the wastewater treatment plant and conveyance system and the water supply network. He said for these investments to be efficiently paid for there is a need for new development to cover costs through development and other contributions.

[144] Mr Thompson stated that the land is able to utilise the infrastructure and be developed if live-zoned. Against this, if it remains Future Urban, it is not available for development. He outlined the economic costs of not zoning the land for development in terms of lost value.

[145] Mr Foy considers that, if the site is not zoned General Business, it is preferable to retain the Future Urban zoning of the site so that it could be rezoned at the same time as the Catholic Diocese and Sullivan blocks, thereby facilitating coordinated development.

General Business

What will it enable?

[146] The zone provides for business and employment activities. Mr Thompson accepted that the General Business zone is an option for the land, as it would enable a commercial corridor connecting the Middle Hill land, the Sullivan and Catholic Diocese land and the Pak'n'Save site.

[147] Mr Thompson says that General Business is primarily a large-format retail zone specifically for retail above 450 m^2, but says there is limited demand for larger retail stores.

[148] Mr Foy says that the General Business zone would accommodate new (large-format) types of retail not currently provided in Warkworth and those large-format retail stores will generate smaller adverse effects on the Warkworth Town Centre than would a Mixed Use zone.

Demand for Large-format retail

[149] Mr Thompson says there is limited demand for larger retail stores. He considers that the main possible tenants already have sites or premises and that some can locate in the Light Industry zone; or that Warkworth has not yet met the demographic threshold for new entrants.

[150] Leaving to one side demand, he agreed that there was a need for more land for large-format retail in Warkworth and that the site is a suitable location, but was doubtful large-format retail would establish given the constraints he identified, and which we address later.

[151] Mr Foy says that additional large-format retail in Warkworth will be required by 2025 if Kowhai Falls is not developed. He provided some detail about his understanding of the Kowhai Falls future tenancies – from his reading of the s 127 application he noted that the tenancies will not be new but will transfer from other locations, and in short, Kowhai Falls is not going to be the large new large-format retail that the town needs and another node will be needed. He referred to his evidence, where he estimated a timeframe of 2030 by when he thought that both Kowhai Falls and large-format retail on the site might both be sustainable. He said he would now bring that forward – it would be a number of years prior to 2030.[62]

[152] Further, he notes that if the Kowhai Falls consent were to lapse, an area broadly equivalent would be required elsewhere in Warkworth, noting that the Middle Hill, Sullivan and Catholic Diocese block is a comparable size to Kowhai Falls.

[153] Mr Foy observed that large-format retail supply would have a different, broader (sub-regional) catchment to that for small format retail, and so would not contribute to a local over-supply, which is why, in his opinion, General

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[62] NOE, page 276, line 11 to page 277, line 27.

Business is more appropriate for this site when compared to Mixed Use.

Employment

[154] Mr Foy considers that the General Business zone is the most appropriate zone for the land primarily because it is the zone most likely to support employment. Because accommodation is a non-complying activity in the General Business zone, Mr Foy says there is greater certainty that the zone would support employment activities than would the Mixed Use zone.

[155] Mr Thompson is of the view that development of the site in the short-medium term would provide additional employment; but that re-zoning the site to Mixed Use would also provide employment if used for residential or commercial activities.

[156] There was, therefore, agreement on the employment benefits of a General Business zone but disagreement on whether it is appropriate on this site because of the constraints Mr Thompson identified and because other land is available for that zoning.

Constraints

[157] One of the Middle Hill site's immediate constraints is not having direct access to Great North Road, which is a barrier to some commercial activities.

[158] Mr Thompson says the Middle Hill site has potential access capacity and timing constraints that limit its use, which is an impediment to only providing for retail and service businesses. The site currently has access only via other parts of the Plan Change 25 area. Mr Thompson considers that those constraints would likely result in the land not being developed in the long term (10+ years) if General Business is applied, and that this would have a significant economic cost (or foregone benefit). He notes there would be relatively high development costs because of access and geotechnical

constraints. He thinks the zone could potentially result in the site being unutilised over the short-medium term, because the lower value General Business activities would not compensate for the high development costs.

[159] Mr Thompson was doubtful a General Business zone would lead to establishment of large-format retail on the land because of the access capacity and timing constraints he identified combined with the lack of demand for larger retail and his assessment that it is not feasible in terms of commercial viability to develop the land for that purpose.

[160] Mr Thompson also referred to the timing of funding and construction of the Western Link Road concluding that the site would not be available for immediate access from Great North Road for 15 to 20 years. Mr Foy agreed that, without access through the Catholic Diocese and Sullivan sites, the site will be quite inaccessible. He noted that it will require a bridge to access it from the south and noted that the access difficulties apply to General Business as well as to Mixed Use. However, he considered that, because the General Business zone is more of a destination retail zone (by virtue of its large-format retail activities that rely on large catchments) than Mixed Use, with its specialised retail nature, poorer access is more tenable for General Business than Mixed Use.

[161] He also observed that there are significant constraints in Warkworth about where business land can establish because of topographical and locational requirements. He further noted that suitable areas have been looked at at a high level as part of the preparation of the Structure Plan, and the Middle Hill land was identified as suitable for a business zoning (albeit Light Industry) at that time.[63]

[162] Mr Thompson disagreed, stating there are many existing and planned

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[63] NOE, page 325, line 10 to page 326, line 7.

sites. He noted that if the site were to be developed primarily for residential use, there are other opportunities for commercial activities on the Catholic Diocese and Sullivan land, or to rezone part of the Light Industry land immediately to the north of the Plan Change 25 site to General Business or Mixed Use, or to rezone additional General Business or Mixed Use land in future stages of the Structure Plan area.

Efficiency

[163] Mr Thompson accepted that General Business is an option for the land, noting that a General Business zoning would meet the demand shortfall for a range of commercial activities he considers are not currently sufficiently provided for in Warkworth. He acknowledges a Mixed Use zone, as with General Business, would enable a commercial corridor and would meet the demand shortfall for a number of commercial activities. That said, Mr Thompson considers that the constraints he has identified – access capacity and timing – limit the land's use under a General Business zoning. He also considers that those same constraints, coupled with the limited demand for large retail stores, will limit the land's use for large-format retail.

[164] In the PC25 hearing, Mr Foy had supported a Light Industry zone for the land, however no Light Industry land was included in the decision. However, Mr Foy considers it is important that conversion of the Future Urban zone to urban zonings provides business land that will support employment generating activities, while avoiding the generation of significant adverse retail distribution effects on Warkworth's centres.

[165] Mr Foy supports a General Business zoning primarily for the employment benefits that will ensue. He considers the site could accommodate large-format retail, which would generate smaller adverse effects on the Town Centre than would Mixed Use. He notes also the constraints on where business land can locate in Warkworth. He considers that a longer-term view of an appropriate zoning is required.

[166] Mr Foy interpreted Mr Thompson's approach to the rezoning as being that there is demand for land now, so the most economically efficient approach is to enable its development through a live (urban) zone; that short-medium term development of the site is more beneficial than development that occurs later – which is also consistent with the appellant's position that flexibility of use is a core driver of the appropriate zoning.

[167] Mr Foy considers it is important to take a longer term view of efficiency. He considers that it is important to achieve an efficient, cohesive urban form and economy that will provide local employment opportunities, provide good access to retail and service businesses and support the operation of an efficient centres hierarchy and network. It is difficult to ensure those longer term outcomes are achieved if the focus is on using whatever land is available as soon as possible.

Mixed Use

What will it enable?

[168] The Mixed Use zone provides for residential activity and smaller scale commercial activity. Mr Thompson notes that one of the important functions of the Mixed Use zone is to provide for a wide range of non-centre business activities that require sites that are accessible, centrally located and with a strong market profile.

Residential v Employment

[169] Mr Thompson said that Mixed Use is most likely to enable a commercial or mixed use development with commercial and residential uses. He thought it less likely that the site would be used primarily for residential use given the large quantity of residential land provided through Plan Changes 25 and 40. His view is that if the land is zoned Mixed Use a master-planned development including some residential and commercial is likely to result, because some uses would benefit from the location close to two intersections and the adjacent residential land. Examples included a medical centre or childcare centre; but he said that in order to be feasible the development would require multiple level buildings, including apartments and office spaces. Dr McDermott agreed that Mixed Use will create the best opportunities for economic growth and employment.

[170] Mr Foy considers it is highly likely that a large proportion of development would be residential (non-employment). In support, he referred to building consent data for the period 2016-2020 which suggests a high proportion of building consents in the Mixed Use zones across Auckland were for residential activities and a smaller proportion for office space, retail and hospitality uses. He considers that residential appears to be the dominant activity in new developments in the Mixed Use zones.

[171] Mr Thompson indicated that, if the site is only used for residential, there need not be a loss of employment opportunities because there are other sites available for business activity in existing zonings and the Future Urban zone.

[172] Mr Thompson was of the view that development of the site in the short-medium term would provide additional employment. He drew on figures that had been estimated by Auckland Council as part of its research for the proposed Auckland Unitary Plan review. He noted that, of the two non-Centre

commercial zones suitable in this location, General Business has the highest employment density (135 per hectare) followed by Mixed Use (70 per hectare). In his view the site is most suited to a non-Centre commercial zone, both of which offer a relatively high employment density. He considered the site would enable employment for 525 people under the General Business zone or 275 people under the Mixed Use zone, assuming it is predominantly business and not residential.

[173] At the hearing, Mr Foy was referred to reports he prepared for the draft Structure Plan, which suggested the numbers of future workers for these zonings would be very similar – between 55 and 51 per hectare respectively (General Business and Mixed Use).[64] That contrasts with Mr Thompson's figures in his primary evidence.

Speciality retail

[174] It was generally agreed between Mr Thompson and Mr Foy that 8,200 m^2 of retail space would be enabled on the site if zoned Mixed Use – likely comprised of predominantly medium format (200-400 m^2) and a smaller amount of specialty retail. Given the demand for retail in Warkworth over the next decade, any competitive effects of an additional 8,200 m^2 of retail would be offset by growth in the next two to four years.

[175] Where they diverged was on the extent of effects. Mr Foy's view is that, while there might be an offset, the development on the site is not the only retail development that would be occurring in Warkworth at the same time. The effects of Mixed Use zoning of the site cannot be viewed in isolation. Together, the effects of those developments would provide for a substantial addition to Warkworth's retail supply and generate effects that would take much longer than two to four years to be offset.

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[64] NOE, page 291, lines 1-11.

[176] To ensure that the site does not compete with Warkworth Town Centre, Mr Thompson agreed with Mr Foy that a limit of 2,000 m^2 upon the total quantity of speciality retail (stores less than 200 m^2) could be applied to the site.

Constraints

[177] Mr Thompson noted the site's good profile to passing traffic, its central location at the intersection of two roads, and its accessibility to primary and secondary catchments. However, he considers most commercial firms will require access from Great North Road and the timing of that access is currently unknown.

[178] Mr Thompson considered that residential and smaller-format retail business and community activities would be more viable if there is partial access rather than a direct full-capacity connection to the Western Link Road/Great North Road/Matakana Link Road intersection. At the hearing we were advised by Auckland Transport that the connection of the Western Link Road with the Great North Road is foreshadowed but not guaranteed.

Efficiency

[179] Mr Thompson considers that the Mixed Use zone is the most efficient for the site. He notes that it enables both residential and commercial activities to occur, for development of the site to respond to market demand with the highest and best use, and for the site to be utilised within the short-medium term. Having regard to s 32, he considers that Mixed Use would provide more benefits than alternative zonings, including General Business and Light Industry. For those reasons, Mixed Use would best achieve a well-functioning urban environment. He also considers that Mixed Use would contribute to meeting the capacity shortfalls in the residential and/or commercial sectors in Warkworth.

[180] Mr Thompson identified the following main economic benefits of a Mixed Use zoning:

(a) it would address the shortage of residential and/or non-centre commercial activity – if non-centre commercial activity is developed, this would increase the employment self-sufficiency in Warkworth;

(b) it would ensure competitive land markets and put downward pressure on the price paid for residential and/or non-centre commercial buildings;

(c) it would efficiently utilise, and thereby contribute to the funding of, existing planned infrastructure, of which there is a regional shortage;

(d) it would ensure the commercial feasibility of development of the site.

[181] He identified the main potential economic cost of a Mixed Use zone is displacing business from a central location with a high exposure/profile. He considers this is offset by the potential for other adjacent sites and other land in Warkworth to be re-zoned for the same activities in the future – if needed, and by the benefits of utilising the infrastructure investment in the site being realised in the short-medium term rather than the long term.

[182] Mr Foy considers all of the identified benefits will arise no matter what zoning is applied, as long as the land is developed. There will be a different development intensity depending on what zone is applied, but from his assessment of the commercial feasibility of development it is likely that the site would still be developed even if not zoned Mixed Use. That means that irrespective of the zoning applied some benefits will accrue, albeit differing in scale as influenced by the intensity and type of development that results. In his view, all of the benefits would be small relative to the total benefits that

will be generated by development throughout the Future Urban zone, because the site is only 0.2% of Warkworth's Future Urban land area.

[183] Mr Foy assesses that there will also be some disadvantages of applying Mixed Use zoning to the site in that the site could be developed for purely residential uses, reducing or removing the prospect of enduring employment being generated on the site. Also, if the site is developed for small-format retail there would likely be some duplication of retail and other commercial activities with the Plan Change 25 local centre and the Warkworth Town Centre. That would potentially slow the development of that centre and the approved Plan Change 25 Mixed Use Zone; there could also be lost potential for cohesive development across the current Great North Road frontage (the site and the Catholic Diocese and Sullivan blocks).

Conclusions on economic evidence

[184] The evidence we heard diverged in several important respects. We have considered all the evidence but set out our conclusions on the primary areas of disagreement.

[185] We have found that the NPS-UD requirements to provide sufficient capacity for housing and business do not apply. We accept however that the RPS requires the provision of certain capacity to a required level. That said, we have determined that there is sufficient land zoned for housing and business in Warkworth.

[186] We find that the access constraints limiting development of the land and identified by Mr Thompson apply to both the Mixed Use and General Business zone options.

[187] We find that the timing constraints for development identified by Mr Thompson and applying if the land is zoned General Business are not such as to prefer the Mixed Use zone over the General Business zone. Appropriate

zoning should not be dictated by a landowner's expectation of being able to immediately develop the land.

[188] We have found that economic feasibility for a landowner should not dictate zoning decisions. A longer term view of efficiency is required which considers the needs of the area: in terms of integrating development – providing land for housing, business and social activities.

[189] We accept it is likely that residential activity will occur or predominate if the site were zoned Mixed Use and prefer Mr Foy's evidence on this point.

[190] We record the witnesses' agreement that zoning the site General Business will enable large-format retail on the site. There is a difference of opinion as to the timing of demand for that form of retail. We find that demand for large-format retail is more likely to occur in the next 10 years (or less) than the 10 – 20 years estimated by Mr Thompson.

[191] We find that benefits will accrue from a 'live-zoning' of the land so long as it is developed.

[192] Employment yields would be similar for Mixed Use and General Business if each were developed only for commercial purposes.

[193] There are locational and topographical constraints in Warkworth which limit the availability of land suitable for General Business.

Urban design

[194] Ms Mein and Mr Munro produced a joint witness statement that recorded their agreement that it would be desirable for the land to be given a Business zoning. They also agreed that the General Business zone is the best option for large-format retail development, if the Court considers that the land should be identified for General Business.

[195] The witnesses addressed the appropriate zone for the site from an urban design perspective, taking into account the location of the land with respect to its surrounding context. The key issue between them was whether Mixed Use or General Business is the better-suited zone. There was no urban design support for a Light Industry zone, and they did not favour the retention of a Future Urban zone. Mr Munro supported Mixed Use and Ms Mein supported General Business.

[196] The witnesses noted, however, that they have been influenced by the economics evidence to understand what specific land use activities should or should not be promoted on the site.

[197] Differences between the witnesses were distilled by the time the matter came to hearing. Matters at issue were the role of the site (or not) as part of a gateway to Warkworth at the junction of the existing and new state highways and the likelihood of a Mixed Use zone undermining the Warkworth Town Centre and the likelihood of an equivalent design quality eventuating between the Mixed Use zone and General Business zone options, because they have the same restrictions of discretion (and many common policies for new buildings).

[198] We address these issues, but first set out the evidence we received on the site's location.

Location

[199] Both witnesses agree that a Business Zone would better reflect the spatial characteristics of the land close to SH 1/Great North Road. Mr Munro considers, at a conceptual level, that application of a Business zone would reflect a Structure Plan principle that something of a balance between the number of houses and the number of jobs available within the settlement should be maintained. He also notes, and Ms Mein concurred, there is

substantial land zoned residential both within the approved area of Plan Change 25 and the recently approved Plan Change 40 surrounding the Warkworth Showgrounds.

[200] Ms Mein notes the nearest Residential-zoned land to the site is located on the southern side of the stream, and that any development of the land on either side would, therefore, likely be separated by a future riparian reserve on either side of that stream. She notes that both Mixed Use and General Business zones include a policy requiring activities adjacent to Residential zones to avoid, remedy or mitigate adverse effects on amenity values of those areas; also that both the Mixed Use and General Business zones also include provisions seeking that development positively contributes to the visual quality and interest of streets, and requiring large scale developments to be of a design quality that is commensurate with the prominence and visual effects of that development.

Gateway

[201] While acknowledging that the site does not possess all of the qualities that would be required for it to function as a standalone gateway, Mr Munro considers that it acts as something of a gateway in two ways. First, it is an entrance from the new Pūhoi to Warkworth motorway; and secondly it is an entrance to Plan Change 25 land from Great North Road and/or the future Matakana Link Road from the east. He noted the site and its buildings will be plainly seen from the new state highway.

[202] Ms Mein disagreed with Mr Munro. She accepts that, when the motorway extension is completed, the point of arrival or 'gateway' to Warkworth by road will include passing the site. However, she notes the site will have no frontage onto either SH 1 or the motorway. Neither will it have frontage onto the Western Link Road. It will be one of a number of sites in the entrance to Warkworth. She considers that the entrance sequence to

Warkworth from the north will begin at the junction of Kaipara Flats and Goatley Roads, as all the land on the northern side of SH 1/Great North Road, between Goatley Road and the Warkworth Showgrounds, is zoned Light Industry.

[203] Regardless of the zoning of the site, Ms Mein considers that an identified area of 3 m landscape planting along the north-eastern boundary of the site, together with landscape screening planting on land owned by Waka Kotahi, would create an extension to the pleasant, treed entrance to the northern edge of Warkworth.

[204] We disagree that the site could be said to be part of a gateway. The site is one of many lining the state highway, and a large part of its frontage to Great North Road is taken up with the Waka Kotahi maintenance building that extends a considerable distance across it. However, we accept that there should be an identified 3 metre area of landscape planting along the north-eastern boundary. A precinct provision will need to be drafted to ensure this occurs.

Urban design effects on the existing Warkworth Town Centre

[205] Mr Munro notes that the site has a challenging means of access. This will inherently blunt any potential it may otherwise have had to appeal to smaller scale retail ahead of zone Centres. He cannot conceive that residents would find it more convenient to access the site from the zoned Local Centre on the Western Link Road for retail. It follows that it would not pose a sufficient or credible threat to that Local Centre when planners were developing where to base their small-scale/specialty format retail projects. He also found it difficult to imagine that residents would find it more convenient to access the site than the existing Warkworth Town Centre because for many the site would be appreciably harder to access. He also noted that the Warkworth Town Centre has a number of amenity advantages.

He accepted that, if the Court were to reach a view that the site could credibly harm the Warkworth Town Centre as a location for small-scale/specialty format retail, precinct limitations on retail could manage that.

[206] We record that towards the end of the hearing, Middle Hill proposed a rule to limit the amount of small-scale retail that could establish on its site. We find that there would be little appreciable impact of a Mixed Use zoning on the Warkworth Town Centre or the Local Centre in terms of small-scale/specialty format retail with the proposed rule in place.

Design quality and restrictions of discretion

[207] Mr Munro concluded that Mixed Use is superior to other identified zones in urban design terms because it has provisions that specifically require quality design outcomes, with an emphasis on the quality of streets and public open spaces; and requires all new buildings to obtain land use consent, including on the basis of development design and quality. Although the General Business zone also requires design-based consent for new buildings, the nature of larger scale and 'lumpier' built form outcomes the zone provides for means that, overall, the General Business zone is likely to deliver a lower quality of built form outcome than a Mixed Use scenario.

[208] Ms Mein states that, if taken in isolation, she would concur with Mr Munro's view that Mixed Use is superior to other zones in urban design terms. However, she notes that Mr Munro, in support of his opinion on that point, states that another reason is because Mixed Use allows for residential dwellings to occur, which is a more efficient use of land when compared with General Business or Light Industry.

[209] On design quality, the witnesses agree that in the General Business zone the built form is likely to be predominantly large scale. They disagree that the General Business zone would deliver a low quality built form.

[210] Ms Mein notes that, as the matters of discretion and assessment criteria for new buildings are identical in both zones, both would require the same degree of rigour in any assessment of built form, including location and design and parking areas.

[211] Mr Munro thinks that the typical outcome for large functional activities is a small, mezzanine-type office component within the large-scale building box (or ground level office) generally less than 8 m-10 m in height. He agrees that, if the Court preferred a General Business zone on the site, an acceptable quality of buildings that recognises the visual prominence of the site would be possible, but this would depend more on the characteristics of the activities proposed than the restrictions of discretion within the Plan.

[212] Following on from that, Mr Munro concluded that, because Mixed Use enables more activities that are, in his opinion, more likely to naturally deliver high quality built form outcomes (and that includes residential dwellings that bring with them a user demand for high amenity) it will be more appropriate than General Business as it relates to built-form quality as a whole.

[213] Both witnesses were extensively cross-examined on this issue of design quality and likely outcomes. We conclude that determining design quality on the basis of what the Mixed Use zone and General Business zone allow is difficult, as what may develop is subject to many variables.

Planners' assessment

[214] We now consider the planners' evaluation of the zoning options. We record that both relied on the evidence from the economists and urban designers. Therefore, we focus only on their analysis of the zoning options in terms of the relevant planning documents. Save for the NPS-UD, there was general agreement on the relevant provisions of the statutory documents. We set those provisions out earlier.

[215] In caucusing, the planners agreed that it would be desirable for the land to be given a Business zoning; that the Mixed Use and General Business zones are the two options that have the greatest merit in planning terms for the site in light of its context and characteristics.[65] They agreed there is no planning case for an additional Business Centre zone in the precinct given the extent of live Business Centre zoning elsewhere, both within the precinct and the wider Warkworth area. They also agreed that if the Court were to determine that large-format retail development is suitable on the site (identified by the Council's economics expert Mr Foy) a General Business zone would be the appropriate zone for that activity.[66]

[216] Mr Firth supports a Mixed Use zoning because it provides for both residential and commercial activity at moderate to high intensities, encourages the compatible mix of both residential and non-residential uses; it will enable new working and living typologies; and anticipates a high level of amenity – which is appropriate considering the adjacent open space and residential zones. Relying on Mr Thompson, he says his analysis shows there is insufficient capacity for residential and commercial land uses in Warkworth. The Mixed Use zone is the only option if both land uses are required. He compares that with the General Business zone, where residential activities are non-complying.

[217] While Mr Firth considered other matters such as traffic generation, amenity values, urban design outcomes and social and economic wellbeing, it is clear to us that he placed significant reliance on the economic evidence addressing demand and capacity for business and housing activity, and economic viability of the zoning for Middle Hill.

[218] In his primary evidence, Mr Firth broadly assessed the statutory planning documents and Part 2 of the RMA. In terms of the NPS-UD and the

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[65] Planners joint witness statement at [5].
[66] Planners joint witness statement at [7].

Regional Policy Statement, he concludes that flexibility and variety in providing housing and business land is required and can only be optimised through a Mixed Use zone. Relying on Mr Thompson, he states that Warkworth has insufficient capacity to meet the medium-term requirements of NPS-UD for commercial and residential uses. In concluding that the Mixed Use zone is the most appropriate zone, he relied on the development feasibility offered by the zone for residential and business activities and the need for further residential land.

[219] Mr Scott differs from Mr Firth on the appropriateness of the zone with reference to the statutory planning documents. For housing capacity under the NPS-UD and the Regional Policy Statement, and relying on Mr Foy, he considers there is sufficient land zoned for housing in Warkworth. In terms of the Regional Policy Statement, he accepted that both zoning options could achieve a quality compact urban form, but that a General Business zone will give better effect to the Regional Policy Statement as it will enable employment growth. He acknowledges that the Mixed Use zone also enables that growth, but considers that residential activities may predominate in the zone. To support the growing community, he prefers the General Business zone.

[220] Considering the District Plan's objectives and policies for the Mixed Use zone, Mr Scott observed that they direct its location close to existing town or city centres. He noted that the Middle Hill land is on the periphery of Warkworth and has no direct linkages to the Town Centre; the provisions for residential activity in the Mixed Use Zone mean the zone is unlikely to fully reach its potential function as an employment-focussed zone. Mr Firth considered that the locational criteria are met when one considers proximity to the proposed Western Link Road, which will be an arterial road near the motorway and the Town Centre.

[221] Mr Scott considers that the General Business zone is the most efficient

and effective zone to achieve the purpose of the plan change and the objectives of the Unitary Plan, and best meets the statutory tests for plan changes. He considers it to be a genuine employment-focused zone that provides for a wide range of business activity without the threat of being undermined by competing residential development enabled within the zone, and accordingly gives better effect to the NPS-UD than the Mixed Use zone. It also better meets the locational criteria in the Plan's objectives and policies, and the relevant provisions in the Regional Policy Statement, including the business and employment provisions in Chapter B2, by providing certainty for a wide range of employment opportunities in the short, medium and long term planning horizons.

[222] Mr Scott states that it is a more efficient use of natural and physical resources and has better regard to the finite characteristics of natural and physical resources (being the finite provision of business and employment land). It will better meet the purpose of the RMA, as it better enables the people and community of Warkworth to meet their future growth needs – both in terms of sustainable and residential growth and employment growth – while avoiding adverse effects on the existing Warkworth Town Centre. It therefore better accords with Part 2 of the RMA than Mixed Use.

[223] Relying on Mr Foy's evidence, he notes there is sufficient land zoned for residential development to meet the varied needs of Auckland's population. Relying on Ms Mein, he considers the Council will have sufficient control over design and appearance, among others, to ensure the scale and structure of development is compatible with adjoining land in the vicinity.

[224] Mr Scott considered that a General Business zone, with its limits on the scale of retail development, will be able to support the vitality and function of the Warkworth Town Centre.

[225] Finally, having regard to strategies prepared under other Acts, Mr Scott

considers that the Mixed Use zone could allow residential to predominate, threatening Warkworth's function as a rural satellite town and increasing its role as a commuter town relying on other locations for employment. In terms of the Auckland Plan, he considers that a General Business zone will provide a better balance between providing land for residential development and ensuring sufficient employment land is available in the medium-long term to support that growth. As to the Structure Plan, he referred to the pattern of land uses and supporting infrastructure for the Future Urban zoned land around Warkworth. He considers that the plan placed importance on employment land, the desire to retain the Town Centre as the business focus of the community, and the desire that it be a self-sustaining community with regard to employment. He considers the General Business zone has better regard to the Structure Plan than does the Mixed Use zoning.

[226] In his rebuttal evidence, Mr Firth disagreed with Mr Scott's assessment addressing the need for employment land, location of the site, NPS-UD, the Plan and Regional Policy Statement and matters of efficiency.

[227] Mr Firth stated that the site is not the last remaining land in Warkworth to be rezoned and developed, and that the zoning of the site as Mixed Use will not result in any significant deficiency for the future employment demands of the wider area. Noting high demand for both housing and business land, he states that the demand can only be met on land that can be developed efficiently. He notes that the cost to develop land is an important consideration. He considers that providing a zone that is driven by efficiency in the market, but that enables more people to live, and more businesses and community services to be located there (referring to NPS-UD Objective 3), is an appropriate use of land. He considers the Mixed Use zone provides for all three of those elements.

[228] Mr Firth maintains there is no requirement in the Plan for the land to be used for business purposes or to retain residential zones in some

proportional relationship with business land. He states the drive for using the land for business use comes from the Structure Plan, and its identification that there should be something of a balance between new houses and new jobs in Warkworth. He cannot see a statutory justification for the site not accommodating residential activities. He considers Mr Scott's approach as something similar to zone rationing.

[229] He acknowledges that the Structure Plan identified the site for employment – being Light Industry zone. He agrees with the purpose but notes that Middle Hill is seeking that its land be used to provide employment for the greater good – through the Mixed Use zone rather than purely Residential. He states that there are many ways to achieve employment and housing.

[230] He notes that even if the Structure Plan's outcome of a balance between living and working is a resource management imperative there is already a substantial amount of commercial business land in Warkworth that is currently live-zoned. Rezoning Middle Hill is not the last chance to provide for employment activities as there is still a substantial area of Future Urban zone available in Warkworth.

[231] We find that the statutory planning documents are consistent in their approaches. At a national level, planning decisions should contribute to well-functioning urban environments, with good accessibility between housing and jobs, among others. At a regional level, sufficient land is required to accommodate residential, commercial and industrial demand. Development has to be integrated. We find it needs to be coherent and balanced, with all needs of a community met.

Location of Park and Ride/Indicative Transport Hub Notation

[232] A question arose in the hearing about the relevance of the 'indicative

transport hub' notation on Precinct Plan 2. In answer to questions, Mr Peake confirmed that an alternative location for an interim park and ride site was identified on a site adjacent to the Warkworth Showgrounds, and was currently under construction. In light of that, Mr Scott considered that the asterisk noting the location of an 'indicative transport hub' on the Sullivan land should be removed from Precinct Plan 2. Middle Hill accepted there may be some logic in removing it. We find that amendment is appropriate, but consider there is no jurisdiction to remove it in this proceeding.

G. Zoning outcome

[233] We were reminded that there is no presumption in favour of any particular zoning of the land. We were referred to *Infinity Group v Queenstown-Lakes District Council*.[67] We are required to determine the most appropriate zone for the land between the status quo (Future Urban) and the proposed zoning options that have been put forward by Middle Hill and the Council.

[234] Middle Hill seeks that its land be zoned Mixed Use. If that does not find favour, it should be zoned General Business. The Council opposes the Mixed Use zoning and supports General Business. While retaining the land as Future Urban zone is an option, all the evidence we received was largely directed to a 'live zone' for the land. In their decision to retain a Future Urban zone the Commissioners pointed to a lack of evidence or rationale supporting a business zoning.

[235] Whether alternative locations for General Business land need to be considered in determining an appeal on a private plan change request was raised by Middle Hill in the hearing. It was suggested that other sites could be used or are suitable for General Business commercial activities.

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[67] *Infinity Group v Queenstown-Lakes District Council* NZEnvC C010/2005, 26 January 2005 at [54].

[236] The Supreme Court in *King Salmon*[68] accepted that the Act does not require consideration of alternative sites as a matter of course in private plan change requests relating to the applicant's own land. However, such consideration is not precluded and there may be circumstances when the possibility of alternative sites must be considered; that will need be determined by the nature and circumstances of the request and the reasons in support. In that case the Court noted that the applicant was seeking use of a public reserve and the proposed use would have significant adverse effects on the natural attributes of the relevant coastal area.[69]

[237] Given that the appeal relates to Middle Hill's land and does not give rise to any significant adverse effects on the natural attributes of the surrounding environment we find that a consideration of alternative sites does not assist our determination of this matter. However, for completeness we address this matter in the following section.

[238] We now turn to determining the appropriate zoning outcome for the land. In reaching our decision we have considered the requirements of ss 32 and 32AA. There is no change proposed to any objectives or policies of the Plan, only to rezone the land (with some proposed rules). We have looked extensively at the benefits and costs and efficiency and effectiveness of rezoning the land in the course of this decision. We have considered the statutory instruments and Part 2 of the Act. We have also considered the Commissioners' decision, which we summarised earlier. From the evidence we have received, we accept the appropriateness of a business zoning for the land.

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[68] *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38; [2014] 1 NZLR 593 at [167]-[168].
[69] *King Salmon* at [170]-[173].

Context and statutory documents

[239] We view the zoning options in terms of the area in which the land sits and the structure planning for the area. Warkworth has a Structure Plan which identified all of the Plan Change 25 land as Future Urban, and set out a pattern of land uses and supporting infrastructure for that land. The Middle Hill land was identified as Light Industry, together with the Catholic Diocese and Sullivan land. It is clear that land identified by the Council for Light Industry and other business uses sits on the fringe of areas identified for residential activities.

[240] The NPS-UD, insofar as it is relevant to our consideration, requires that planning decisions contribute to well-functioning urban environments that have or enable a variety of homes; a variety of sites suitable for different business sectors in terms of location and site size; and have good accessibility for people between housing, jobs, community services, among others, including by way of public or active transport.

[241] The provisions of the NPS-UD and Regional Policy Statement are clear. There must be support for growth. At a national level, the aim is for well-functioning urban environments and good accessibility between housing and jobs, among others. At a regional level, Auckland's growing population increases demand for housing, employment, business, infrastructure, social facilities and services. There is a focus on a quality compact urban form, and that sufficient development capacity and supply is provided to accommodate residential, commercial and industrial growth and social facilities to support growth.

[242] Provision for growth is tempered – it requires integrated planning of land use, infrastructure and development. Rezoning of Future Urban land is to follow structure planning and plan change processes.

[243] It is clear to us that provision for growth must be balanced – just as there should be provision for residential land supply, so should there be provision for commercial, industrial land and social facilities.

[244] For Warkworth, that growth is informed by two planning documents, the Auckland Plan and the Warkworth Structure Plan. They set the high level response to the issues facing Auckland, and must be considered. Both emphasise the need for balance between providing land for residential development and ensuring sufficient employment land is available to support growth.

[245] The District Plan provides for various Business zones, the purposes of which we have summarised earlier. The relation of each zone to the other in terms of the centres' hierarchy is clear. We have considered the purpose of each available zone and what it enables. It is clear that the Mixed Use zone directs its location near to existing town or city centres. It enables retail and residential activities. The Middle Hill land is on the periphery of Warkworth and has no direct linkages to the Warkworth Town Centre. In contrast, General Business is an employment focussed zone that provides for a wide range of business activity, including large-format retail. There is potential for future business developments on the neighbouring properties to benefit from direct access to Great North Road.

Effects

[246] With those matters in mind, we turn to consider the effects of the proposed rezoning.

[247] Extensive evidence was called by Middle Hill in support of its request for a Mixed Use zoning, and the Council took no issue with the civil, geotechnical, ecological or traffic (save for that we addressed) impacts of a rezoning from Future Urban to Mixed Use.

[248] Issues remained as to the effects of the proposed zoning from a statutory planning, economic and urban design perspective.

[249] The issues between the economists and the planners distilled to disputes as to housing capacity, economic feasibility, whether General Business or Mixed Use gives better effect to the statutory planning documents in terms of enabling employment, and timing – just when should development be enabled when the land is zoned?

[250] We do not accept that this land needs to be zoned so as to enable further housing or business capacity in Warkworth; there is sufficient capacity. Having said that, there may be a need , before 2030, for land to accommodate large-format retail. We also note that capacity must be suitable to meet the demands of different business sectors. We accept that there are constraints in Warkworth about where business land can develop because of topographical and locational constraints – that suitable areas were looked at as part of the development of the Structure Plan and the Middle Hill land was identified as suitable for a business zoning (albeit Light Industry). We find that the other sites identified on Middle Hill's behalf for commercial activities are unlikely to be available because they have already been zoned residential or identified for other zonings in the Structure Plan.

[251] We have found that the economic feasibility of developing a site for an owner is not a determining factor in considering the appropriate zoning for a site. Were that so, land would only ever be zoned for its highest and best use, in this case residential or small format retail, leaving no possibility of it being zoned for perhaps less economically attractive purposes such as industrial.

[252] That brings us, then, to the primary question of whether it is appropriate to zone the land to enable further housing and/or business capacity. That gives rise to the remaining issue as to the appropriateness of ensuring that the balance the statutory documents call for in developing an

area is achieved. On the face of it, both zones would enable employment.

[253] The Regional Policy Statement speaks of a quality urban form and the provision of sufficient capacity to accommodate residential, commercial and industrial growth. Planning must be integrated.

[254] The Auckland Plan and the Structure Plan require that sufficient employment land is available to support growth.

[255] We determine that, on a numerical basis alone, either zone will likely benefit employment, with the General Business zone providing a slightly higher potential. However, we find that there is no certainty that Mixed Use will result in predominantly business activities on the site given the ability to construct houses. Save for limits on specialty retail, no provisions were offered by Middle Hill to limit the activities that would take place on the land if a Mixed Use zone was applied to the land – no master planning was proposed which could have shown the different forms of development.[70]

[256] We accept that it is highly likely that the land will be developed for residential purposes if zoned Mixed Use, making it simply an extension of the adjacent residential land and reducing the employment capacity of the site and Warkworth. We accept that further Mixed Use land is not needed in Warkworth. In particular we note that a large area of land within the PC25 area has already been zoned for Mixed Use.

[257] Finally, while Mr Thompson accepted that there is a need for more land for large-format retail in Warkworth and that the site is a suitable location, he maintained that large-format retail may well not be developed on the site for many years; because of access constraints and lack of demand. Further, the zone is not commercially viable/economically feasible.

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[70] NOE, p 204, line 30 to page 205, line 14.

[258] We note there is some dispute about the timing of the need for more large-format retail land. The dispute lay in whether the site would be developed for large-format retail in the next 10-20 years, given its access constraints and location. We prefer Mr Foy's evidence on this point and consider that Warkworth will require land for large-format retail within the next 10 years.[71]

[259] The site is small in the context of Warkworth, and it might be observed that its zoning for General Business will make little difference to the availability of land for employment purposes. However, a developing area needs to provide zones that support housing, including those which enable employment, industry and retail. We accept there is a need to provide land for employment, including large-format retail. We do not accept that the land has to be capable of development in the short term to justify the zoning. We have already found that commercial viability (alone) should not drive a zoning decision.

[260] We accept that both zoning options will generate economic and employment benefits for the area. However, we find that the General Business zone is likely to benefit the area more in terms of employment opportunities and provides for large-format retail, and that proximity to Great North Road is a factor in favour of that zone. Further, that a Mixed Use zoning is likely to lead to the development of more housing, which will not facilitate the provision of employment in the area.

[261] We find that a General Business zoning is the most appropriate way to achieve the purpose of the RMA.

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[71] D Foy at [94].

H. Result

[262] The appeal is upheld to the extent that the zoning for the Middle Hill site is changed to General Business.

[263] Amendments to the Plan Change are to be made as follows:

(i) traffic rules are to be made in terms of those agreed between parties and described in paragraph [88];

(ii) provision is to be made for a 3 metre landscape planting area as described in paragraph [204].

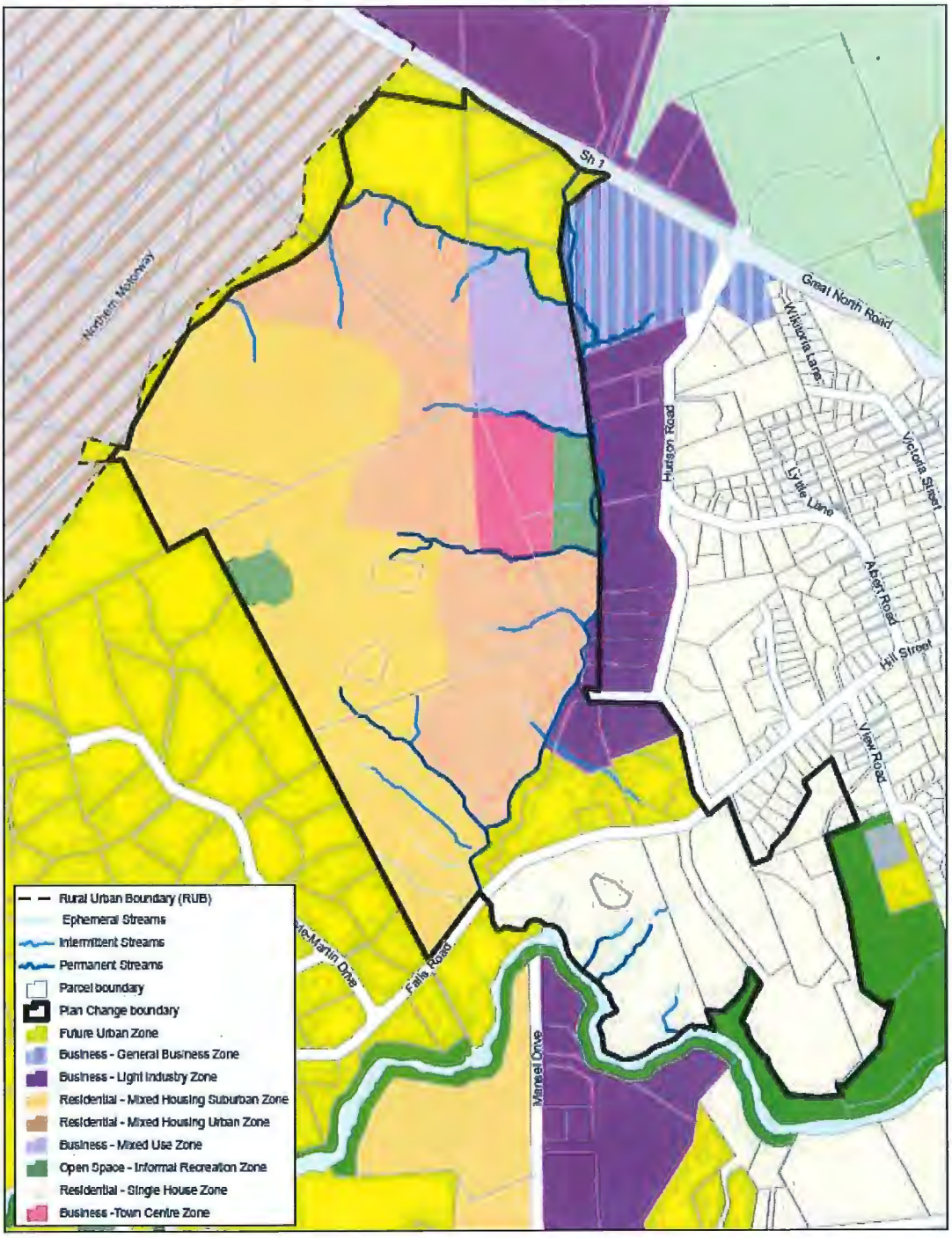
A draft order is to be filed for the Court's consideration.

[264] Costs are reserved. Any application is to be made within 15 working days and responses filed within a further five working days.

MJL Dickey
Environment Judge

Annexure 1

Appendix 3 – Warkworth North Zoning Map, Precinct Plans, Stormwater Management and Control Plan, and Significant Ecological Area Overlay



Warkworth North Plan Change
Plan 1 - Zoning Map

Auckland Council

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 55

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under clause 14 of the First Schedule to the Act
BETWEEN	COLONIAL VINEYARD LIMITED
	(ENV-2012-CHC-108)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner A J Sutherland
Venue:	Blenheim
Hearing dates:	9 to 13 and 16 and 17 September 2013. (Final submissions received 24 October 2013).
Appearances:	N Davidson QC and M J Hunt for Colonial Vineyard Limited S F Quinn and M Booth for Marlborough District Council Q A M Davies and D P Neild for New Zealand Aviation Limited and The Marlborough Aero Club (under s274) M Radich for Trustees of the Carlton Corlett Trust (under s274)
Date of Decision:	14 March 2014
Date of Issue:	14 March 2014

DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A: Under section 290 of the Resource Management Act 1991:

(1) the appeal is allowed;

(2) the decision of the Marlborough District Council dated 31 July 2012 is cancelled; and

(3) Plan Change 59 as notified is approved subject to the changes stated in the Reasons below.

B: Subject to C, the parties are directed to discuss the proposed policies, maps and rules and if possible to lodge an agreed set by Wednesday 30 April 2014.

C: Under section 293 the council is directed to consult with the parties over the urban design principles included in Mr T G Quickfall's Appendix 4 and to lodge its approved version for approval by the Environment Court by 30 April 2014.

D: Leave is reserved for any party to apply for further directions (under section 293 of the RMA or otherwise) if agreement cannot be reached.

E: Costs are reserved.

REASONS

Table of Contents Para

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1. Introduction

1.1 The issue: should the land be rezoned residential?

[1] The principal question in this proceeding is whether a 21.4 hectare vineyard in New Renwick Road on the southern side of the Wairau Plains near Blenheim should be rezoned for residential development, as sought in private Plan Change 59 ("PC59").

1.2 The vineyard and its landscape setting

[2] The vineyard is owned by Colonial Vineyard Ltd ("CVL"). The land is legally described as Lot 2 DP350626 and Lot 1 DP11019 ("the site"). The site is flat and is located south of New Renwick Road between Richardson Avenue and Aerodrome Road, on the periphery of Blenheim. It is west of the Taylor River which is about 100 metres away at its closest, and about 400 metres from the extensive reserves and walking tracks of the Wither Hills. The site is currently planted with Sauvignon Blanc grapes, and the north, south and east boundaries are lined by olive trees[1].

[1] M Davis, evidence-in-chief at para [9] [Environment Court document 3].

[3] The land opposite the site on the eastern and northern boundaries has Residential zoning[2]. The land to the south of the site is rural land owned by the Carlton Corlett Trust. It is currently in pasture and light industrial/commercial development and likely future light industrial development[3].

[4] Further to the south, on more land owned by the Carlton Corlett Trust, are the Omaka Aviation Heritage Centre and related aviation and engineering activities, and a Car Museum. An airport used for general aviation called "the Omaka airfield" adjoins the Omaka Museum site and is to the southwest of the CVL site.

[5] The Omaka aerodrome was established in 1928 and contains what are reputed to be the oldest set of grass runways in the country. The Marlborough Aero Club Inc., which is based there, is one of the oldest flying clubs in the country. Omaka is now the main airfield in Marlborough for general (as opposed to commercial) aviation. Operations include helicopter businesses for crop spraying and frost protection, pilot training and aircraft repair work. Omaka is also the home of the Aviation Heritage Centre which houses a superb collection of World War I aircraft and replicates and other memorabilia. The grass runways and the adjacent workshops in the hangars are of heritage value, whereas the helicopter operations and some of the aircraft maintenance are parts of the "air transport" infrastructure.

[6] The site and the airfield are about 600 metres apart at their closest. The 55 dBA Ldn noise contour from the Omaka airfield currently crosses the Carlton Corlett land in (approximately) an east-west line several hundred metres south of the site as shown in the acoustic engineer, Dr J W Trevathan's Plan B[4]. This contour is based on three months of data recorded by Mr D S Park and includes helicopter noise abatement paths as discussed later in this decision.

[7] Blenheim's urban area is to the north and east of the site. The Wither Hills lie south, and to the west and northwest is the Wairau Plain, principally covered in large-scale vineyards. Approximately 5 kilometres northwest of the site is Marlborough's main commercial airport at Woodbourne.

1.3 Plan Change 59

[8] CVL was the initiator of the request for a private plan change (PC59) to the Wairau Awatere Resource Management Plan ("WARMP"). The proposal for Plan Change 59 was lodged with the Marlborough District Council in April 2011. PC59 sought to rezone the site from Rural 3 (the Wairau Plain zone) to Urban Residential 1 and 2 to provide for residential development. The plan change also sought to amend or

2 T G Quickfall, evidence-in-chief [9](b) [Environment Court document 18].
3 T G Quickfall, evidence-in-chief [9](c) [Environment Court document 18].
4 J W Trevathan, supplementary brief of evidence, Attachment B [Environment Court document 14B].

add some policies[5] in the district plan, together with consequential changes to methods of implementation.

[9] CVL initiated its plan change following the initial completion of the Southern Marlborough Urban Growth Strategy 2010 ("the 2010 Strategy") that assessed the residential growth potential in different areas using a "multi-criteria" approach[6]. The analysis under the 2010 Strategy is quite comprehensive and CVL placed some reliance on that process and its findings as part of its section 32 analysis of PC59.

[10] CVL's original version of PC59 (as notified) sought the following:

(a) to produce a residential development consistent with good design principles;
(b) to rezone the bulk (15 hectares) of the site as Urban Residential 1;
(c) to rezone 6.4 hectares on the southern and western boundaries of the site as Urban Residential 2;
(d) to amend the WARMP by introducing proposed policies set out in Appendix 1 to the application;
(e) to amend Appendix G of the WARMP so that the CVL site be identified and the rules will require buildings to be constructed in accordance with the 'Indoor Design Sound Levels set out in Appendix M'[7].

[11] The only important policy change is that PC59 (as notified) proposes that policy (11.2.2)1.3 be amended as follows:

> Maintain high density residential use <u>close to open spaces and</u> within the inner residential sector of Blenheim located within easy walking distance to the west and[8] [south of] the Central Business Zone.

The underlined words are the addition. The effect of the proposed change would be to allow some relatively high density residential development close to open spaces, thus expanding the scope for residential development of the site, and elsewhere to the south of the CBD.

[12] The application for a plan change was approved for notification and publicly notified. There were submissions and a hearing. So far that was routine. However, at the council hearing CVL purported to amend its application to incorporate the following changes:

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5 Policies (11.2.2)1.3; (19.3)1.7 and (19.7)1.8; (23.5.1)1.17 and 1.18; (29.2)8.1.
6 T G Quickfall, evidence-in-chief [15] [Environment Court document 18].
7 Commissioners' Decision para 12 – citing the CVL application at p 56.
8 PC59 actually uses the words "sought for" rather than "south of" but that misquotes (and makes nonsense of) the actual policy.

(a) the provision of an internal roading hierarchy including a primary local road and low speed residential streets;
(b) a requirement for acoustic insulation within the entire site for dwellings;
(c) a new zoning map;
(d) a concept plan showing likely roading connections and open space layout; and
(e) other changes to objectives and policies to better reflect those requirements in this location.

Changes (a) to (d) cause us no jurisdictional difficulties, but (e) may.

[13] The potential difficulties were compounded because the proposed objectives and policies were further amended in Mr Quickfall's evidence. CVL now proposes to add two new objectives to Section 23.6 of the WARMP[9]. The first is a new objective specific not to the site but to Omaka Aerodrome and the aviation cluster. This would be[10]:

> To recognise, provide for and protect on-going operation and strategic importance of the Omaka Aerodrome and aviation cluster (activities related to the Aerodrome).

While well-intentioned, the additions to objectives proposed by CVL at the council hearing and then, in an expanded version, to the court are beyond jurisdiction. They refer to land which is not the subject of the notified plan change (and not even contiguous to the site) and there are persons not before the court (e.g. some neighbours of the airfield) who might be affected by further amendments to the plan change. On the principles stated in *Hamilton City Council v NZ Historic Places Trust*[11] and *Auckland Council v Byerley Park Limited*[12], there must be considerable doubt about the court's jurisdiction to add the first objective. In any event, since no party suggested we give directions under section 293 in respect of them, we will not consider them further.

[14] Although the 2010 Strategy made some initial recommendations, the final recommendations are dated March 2013 and were adopted by MDC on 21 March 2013. These final recommendations note the importance of Omaka airfield as a regional resource and suggest that the appellant's land (the subject of PC59) be earmarked for employment activities, rather than residential. That is a significant shift from the 2010 Strategy's recommendations[13] as we shall discuss in more detail later.

[15] The council issued its decision declining CVL's application for private plan change on 31 July 2012. CVL appealed the decision to the Environment Court. The

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9 We question the number: existing 23.6 of the WARMP relates to Methods of Implementation, not objectives or policies.
10 T G Quickfall, evidence-in-chief Annexure 4 [Environment Court document 18].
11 *NZ Historic Places Trust v Hamilton City Council* [2005] NZRMA 145 at [25] (HC).
12 *Auckland Council v Byerley Park Limited* [2013] NZHC 3402 at [41]-[42].
13 M J Foster, evidence-in-chief [1.11] [Environment Court document 27].

council supported its decision and was supported by the section 274 parties — NZ Aviation Ltd and the Marlborough Aero Club (together called "the Omaka Group") and the Carlton Corlett Trust.

[16] Throughout the hearing various terms were used to describe non-residential urban land. We will, with some reservations about the term's generality, follow the council's new practice and use the term "employment land" to encompass land suitable for business, retail and industrial uses.

1.4 What matters must be considered?

[17] Since these proceedings concern a plan change we must first identify the legal matters in relation to which we must consider the evidence. In *Long Bay-Okura Great Park Society Incorporated v North South City Council*[14] the Environment Court listed a "relatively comprehensive summary of the mandatory requirements" for the RMA in its form before the Resource Management Amendment Act 2005. The court updated this list in the light of the 2005 Amendments in *High Country Rosehip Orchards Ltd v Mackenzie District Council ("High Country Rosehip")*[15]. We now amend the list given in those cases to reflect the major changes made by the Resource Management Amendment Act 2009. The different legal standards to be applied are emphasised, and we have underlined the changes and additions[16] since *High Country Rosehip*[17]:

A. General requirements
   1. A district plan (change) should be designed to **accord with**[18] — and assist the territorial authority **to carry out** — its functions[19] so as to achieve the purpose of the Act[20].
   2. The district plan (change) must also be prepared **in accordance with** any regulation[21] (there are none at present) and any direction given by the Minister for the Environment[22].
   3. When preparing its district plan (change) the territorial authority **must give effect to**[23] any national policy statement or New Zealand Coastal Policy Statement[24].
   4. When preparing its district plan (change) the territorial authority shall:
      (a) **have regard to** any proposed regional policy statement[25];

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14 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

15 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.

16 Some additions and changes of emphasis and/or grammar are not identified.

17 Noting also:
   (a) that former A6 has been renumbered as A2 and all subsequent numbers in A have dropped down one;
   (b) that the list in D has been expanded to cover fully the 2005 changes.

18 Section 74(1) of the Act.

19 As described in section 31 of the Act.

20 Sections 72 and 74(1) of the Act.

21 Section 74(1) of the Act.

22 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

23 Section 75(3) RMA.

24 The reference to "any regional policy statement" in the *Rosehip* list here has been deleted since it is included in (3) below which is a more logical place for it.

25 Section 74(2)(a)(i) of the RMA.

(b) **give effect to** any operative regional policy statement[26].

5. In relation to regional plans:
   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order[27]; and
   (b) **must have regard to** any proposed regional plan on any matter of regional significance etc[28].
6. When preparing its district plan (change) the territorial authority must also:
   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[29] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[30];
   - **take into account** any relevant planning document recognised by an iwi authority[31]; and
   - not have regard to trade competition[32] or the effects of trade competition;
7. The formal requirement that a district plan (change) must[33] also state its objectives, policies and the rules (if any) and may[34] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act[35].

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies[36];
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness,** as to whether it is the most appropriate method for achieving the objectives[37] of the district plan **taking into account**:
    (i) the benefits and costs of the proposed policies and methods (including rules); and
    (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[38]; and
    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[39].

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment[40].

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26 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
27 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
28 Section 74(2)(a)(ii) of the Act.
29 Section 74(2)(b) of the Act.
30 Section 74(2)(c) of the Act.
31 Section 74(2A) of the Act.
32 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.
33 Section 75(1) of the Act.
34 Section 75(2) of the Act.
35 Section 74(1) and section 32(3)(a) of the Act.
36 Section 75(1)(b) and (c) of the Act (also section 76(1)).
37 Section 32(3)(b) of the Act.
38 Section 32(4) of the RMA.
39 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.
40 Section 76(3) of the Act.

12. Rules have the force of regulations[41].
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[42] than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land[43].
15. There must be no blanket rules about felling of trees[44] in any urban environment[45].

E. Other statues:
16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)
17. On appeal[46] the Environment Court must **have regard to** one additional matter — the decision of the territorial authority[47].

[18] In relation to A above:

(1) it is expressly within the prescribed functions of the council to control[48] the actual or potential effects of the use, development and protection of land by establishing and implementing[49] objectives, policies and rules. Part 2 of the Act is considered later;
(2) there are no directions from the Minister for the Environment;
(3) no national policy statement is relevant, nor is the NZ Coastal Policy Statement;
(4) we outline the relevant provisions in the operative regional policy statement in Part 2 of this Decision;
(5) the regional plan is the district plan in this case because, as a unitary authority the Marlborough District Council has prepared a combined plan[50];
(6) none of the witnesses identified any relevant matter under this heading;
(7) section 75(2) would be satisfied by acceptance or refusal of PC59.

We will return to the issue of whether the plan change achieves the purpose of the RMA at the end of this decision.

[19] Item B is irrelevant since objectives of the district plan are not sought to be changed by the plan change as notified.

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41 Section 76(2) RMA.
42 Section 76(2A) RMA.
43 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.
44 Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
45 Section 76(4B) RMA — this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
46 Under section 290 and Clause 14 of the First Schedule to the Act.
47 Section 290A RMA as added by the Resource Management Amendment Act 2005.
48 Section 31(1) RMA.
49 Section 31(1)(b) RMA.
50 Chapter 1 para 1.0 [WARMP p 1-1].

[20] In relation to C, a key part of the case is to consider the proposed new policy and the rezoning. Since the new policy effectively seeks to justify the zoning of the site for residential purposes, we will consider the policy and the zoning together under the section 32 tests. They require us to examine, having regard to the efficiency and effectiveness of the proposed policy change and zoning, whether they are the most appropriate method for achieving the objectives of the district plan.

[21] We will consider D in relation to the proposed rules at the appropriate time. E (Other statutes) is irrelevant. Finally, in relation to F: we will have regard to the Commissioners' decision at the end of this decision.

1.5 The questions to be answered

[22] In summary the questions which need to be answered under the list in the previous section are:

- what are the relevant provisions in the operative regional policy (which must be given effect to) and what are the relevant objectives in the WARMP — the operative district plan (which must be implemented by PC59)? [See 2 below];
- what are the benefits and costs of PC59 and the alternatives? [See 3 below];
- what are the risks of approving (or not) PC59? [See 4 below];
- does PC59 give effect to the RPS and is it the most appropriate method for achieving the objectives of the WARMP? [See 5 below];
- does PC59 achieve the purpose of the RMA? [See 6 below];
- should the result be different from the council's decision? [See 7 below].

[23] The first alternative in this case is, whether the site should be rezoned for residential development now or whether any urban rezoning should wait until a district plan review is carried out. It is largely uncontested (at least by the council, the Omaka Group position is less clear) that the site should be used for urban purposes. However, the case for the council before us was that the site should probably be used for industrial ("employment") purposes, and that should be resolved in a proposed plan review.

[24] The other choice is to do nothing. That is, to retain the existing zoning at present because of the alleged effects that residential development may have on future use of the Omaka airfield and the Omaka Aviation Heritage Centre.

2. Identifying the relevant objectives and policies

2.1 The Marlborough Regional Policy Statement

[25] We must give effect to any operative regional policy statement. In these proceedings the relevant document is the Marlborough Regional Policy Statement ("the RPS") which became operative on 28 August 1995. The policies and methods most relevant to this proceeding are found in the chapter on Community Wellbeing (Part 7 of the RPS). Objective 7.1.2 focuses on the quality of life, seeking to maintain and enhance the quality of life for people while ensuring activities do not adversely affect the environment. Implementing policy 7.1.5 seeks to avoid, remedy or mitigate adverse effects of activities on the health of people and communities. Another implementing policy is to enhance amenity values provided by the unique character of Marlborough settlements[51]. The explanation recognises that Blenheim is the main urban, business and service settlement in Marlborough.

[26] A further policy[52] enables the appropriate type, scale and location of activities by:

- clustering activities with similar effects;
- ensuring activities reflect the character and facilities available in the communities in which they are located;
- promoting the creation and maintenance of buffer zones (such as stream banks or 'greenbelts');
- locating activities with noxious elements in areas where adverse environmental effects can be avoided, remedied or mitigated.

[27] Objective 7.1.14 is to provide safe and efficient community infrastructure in a sustainable way. An important implementing policy relates to 'Air Transport'. The relevant policy, methods and explanation state[53]:

> 7.1.17 Policy – Air Transport
> [To] enable the safe and efficient operation of the air transport system consistent with the duty to avoid, remedy or mitigate adverse environmental effects.
>
> 7.1.18 Methods
> (a) Recognise and provide for Marlborough (Woodbourne) Airport as Marlborough's main air transport facility for both military and civilian purposes.
>
> *Marlborough Airport is an important link for air transport (for passengers and freight) between Marlborough and the rest of New Zealand and potentially overseas. Operation of the airport for civilian and military purposes is an important activity in Marlborough and it is appropriate that Council has a policy which reflects this.*

51 Policy 7.1.7 [RPS p 57].
52 Policy 7.1.10 [RPS p 59].
53 Policy 7.1.17 and 18 RPS.

(b) Commercial and industrial activities which support or service the air transport industry and defence will be provided for.

Facilities at Marlborough Airport and the associated RNZAF Base Woodbourne are well developed to serve air transport and military aviation needs. This policy recognises this and seeks to promote commercial and industrial development and military activities associated with air transport.

(c) Regulate within the resource management plans, land use activities which have a possible impact on the safe and efficient operation of air transport systems.

Urban development in the vicinity of Woodbourne Airport should be discouraged where the use of land for such purposes would adversely affect the safe and efficient operation of aircraft and airport facilities. Some controls may be necessary to ensure that activities do not conflict with the safe and efficient operation of aircraft operating into and out of Marlborough. The resource management plans will also provide for navigation aids within Marlborough which service aircraft using the airport and for any aircraft generally in the area.

It is noteworthy that the Woodbourne airport is identified as the main air transport facility for Marlborough. The Omaka airfield is not expressly mentioned. In his closing submissions for the council, Mr Quinn stated that the Omaka airfield is regionally significant[54] in respect of its provision of general aviation functions since Woodbourne is primarily a commercial airport for scheduled air services and some military activity. The RPS does not support that submission. At best the significance of the Omaka airfield is recognised at the policy level in the District Plan, (as we will see shortly). On the other hand, the Omaka airfield does have heritage values — especially in connection with the Aviation Heritage Centre — which we consider later.

[28] In relation to heritage values, objective 7.3.2 of the RPS requires that buildings and locations identified as having significant heritage value are retained. Potentially, that could apply to the Omaka airfield. However, the implementing policy[55] is to protect "identified" heritage features. The methods contemplate that resource management plans will identify significant features, and the Omaka airfield has not been so identified in the RPS.

2.2 The Wairau Awatere Resource Management Plan

[29] The combined district and regional plan for the Wairau Awatere area of the district is called "The Wairau Awatere Resource Management Plan" (abbreviated to "WARMP") and envisages its life as being ten years[56]. It became operative in full on 25 August 2011.

[30] The WARMP is in three volumes. Volume 1 contains 24 chapters of objectives and policies, the rules are in Volume 2, and zoning and other maps are in Volume 3. Of the many chapters of objectives and policies, three are of particular relevance in this proceeding. They are:

54 Closing submissions for Marlborough District Council, dated 4 October 2013, at [87].
55 Policy 7.3.3 RPS.
56 Chapter 1, para 1.5 [WARMP Vol 1 p 1-2].

Chapter 11	Urban Environments
Chapter 12	Rural Environments
...	
Chapter 22	Noise

[31] The principal policies guiding potential residential development are found in Chapter 11, to which we now turn.

Urban environments (Chapter 11)

[32] The first objective in this chapter of the WARMP is to maintain and create[57] residential environments which provide for the existing and future needs of the "community". The primary policy to implement that objective is to accommodate[58] residential growth and development of Blenheim within the current boundaries of the town. Policy 1.3 states:

> Maintain high density residential use within the inner residential sector of Blenheim located within easy walking distance to the west and[59] south of the Central Business Zone.

We have already recorded that PC59 proposes a minor change to this policy with the addition of words justifying high density residential use "close to open spaces".

[33] Some urban expansion is contemplated by policy 1.5 which is[60]:

> ... [to] ensure where proposals for the expansion of urban areas are proposed, that the relationship between urban limits and surrounding rural areas is managed to achieve the following:
>
> - compact urban form;
> - integrity of the road network;
> - maintenance of rural character and amenity values;
> - appropriate planning for service infrastructure; and
> - maintenance and enhancement of the productive soils of rural land.

[34] Chapter 11 of the WARMP also describes the sort of environment contemplated for an urban environment. Objective 11.4 provides for "the maintenance and enhancement of the amenities and visual character of residential environments".

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57 Objective (11.2.2)1 [WARMP p 11-3].
58 Policy (11.2.2)1.1 [WARMP p 11-3].
59 PC59 actually uses the words "sought for" rather than "south of" but it misquotes (and makes nonsense of) the actual policy.
60 Policy (11.2.2)1.5 [WARMP p 11-3].

[35] Chapter 11 of the WARMP also provides for business and industrial activities. In relation to the latter the objective[61] is to contain the effects of industry within the two identified Industrial Zones: the heavy industrial activity in Industrial 1 Zone at Riverlands and Burleigh; and the lighter Industrial 2 Zone strung along State Highways 1 and 6. There is no objective or policy governing the creation of new industrial zones within the urban environments of the district.

The rural environment (Chapter 12)

[36] Chapter 12 contains two relevant sections, relating to General Rural Activities and to Airport Zones. Subchapter 12.4 which covers the area outside Wairau Plain's Rural 3 zoning[62] contains an objective[63] of providing a range of activities in the large rural section of the district. The implementing policy[64] seeks to ensure that the location, scale and nature, design and management of (amongst other activities) industry will protect the amenity values of the rural areas. In summary, any industrial growth in the Rural Zones is to be in the general rural areas, not in the lower Wairau Plain.

[37] In fact the land of most interest to this case is in special zones:

- the current zoning of the site[65] is Rural 3;
- the Omaka airfield is zoned[66] 'Airport Zone' (as are the Woodbourne and Picton airfields) in the WARMP;
- the Aviation Museum site to the northeast of the Omaka airfield is also zoned Rural 3.

[38] Chapter 12 (Rural Environments) of the WARMP sets out a range of issues, objectives and policies for the district's "Airport zone[s]". PC59 as notified did not include any amendments to chapter 12 and so it should be consistent with the objectives and policies in that chapter so far as that may be required by the plan. Paragraph 12.7.1 identifies[67] as an issue:

> Recognition of the need for and importance of national, regional and local air facilities, and providing for them, whilst avoiding, remedying or mitigating any adverse effects of airport activities on surrounding areas.

The explanation continues:

> Each of the air facilities has the potential to cause significant environmental effects including traffic generation, chemical / fuel hazard, landscape impact, and most significantly, noise pollution. The operational efficiency and functioning of Marlborough Airport, Base

61 Objective (11.4.2)1 [WARMP p 11-24].
62 Subchapter 12.2 pp 12-1 *et ff.*
63 Objective (12.4.2)2 [WARMP p 12-15].
64 Policy (12.4.2)2.5 [WARMP p 12-15].
65 See e.g. Map 155 in WARMP Vol 3.
66 See Maps 153 and 164 [WARMP Vol 3] which shows the airport zone in an ochre colour and specifically identifies "Omaka Airport".
67 WARMP Vol 1 p 12-22.

> Woodbourne, and Omaka Airfield requires continual on-site maintenance and servicing of aircraft, often associated with significant noise generation (engine testing in particular). It is essential for the continued development of industry, commerce and tourism activity in the District that a high level of air transport access is maintained. Performance standards will be applied to all activities within airport areas to avoid, remedy or mitigate adverse effects. **Likewise, the sustainability of the airport is also dependent on not being penalised by the encroachment of activities which are by their very nature sensitive to noise for normal airport operations.** (emphasis added).

[39] In that light, the objective and three policies for the airport zone(s) are[68]:

Objective 1	The effective, efficient and safe operation of the District's airport facilities.
Policy 1.1	To provide protection of air corridors for aircraft using Marlborough, Omaka and Picton Airports through height and use restrictions.
Policy 1.2	To establish maximum acceptable levels of aircraft noise exposure around Marlborough Airport and Omaka Aerodrome for the protection of community health and amenity values whilst recognising the need to operate the airport efficiently and provide for its reasonable growth.
Policy 1.3	To protect airport operations from the effects of noise sensitive activities.

[40] The methods of implementation identified are to represent the airfields as Airport Zones in the planning maps and then to establish rules to[69]:

> Plan rules provide for the continued development, improvement and operation of the airports subject to measures to avoid remedy or mitigate any adverse effects. Rules define the extent of the airport protection corridors through height and surrounding land use restrictions.
>
> Plan rules will, within an area determined with reference to the 55 Ldn noise contour (surveyed in accordance with NZS 6805 'Airport Noise Management and Land Use Planning'), require activities to be screened through the resource consent process and where permitted to establish noise attenuation will be required.
>
> | | |
> |---|---|
> | Performance Conditions | Conditions are included to protect surrounding residential land uses from excessive noise. |

[41] In fact no air noise contours or outer control boundaries have yet been introduced for the Omaka airfield. In contrast they <u>are</u> shown for the Woodbourne Airport on Map 147[70] as an "Airport Noise Exposure Overlay". CVL placed significant weight on this difference since the WARMP anticipated that an outer control boundary will be created for all the District's airports[71]. The council's evidence is that the process began for the Omaka airfield in 2007[72] and as demonstrated by the uncertainty in the noise evidence it will apparently take some time yet to resolve.

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68 Objective 12.7.2 [WARMP p 12-23].

69 Para 12.7.7.3 [WARMP p 12-23 to 12-24].

70 WARMP Vol 3 Maps 146 and 147.

71 e.g. noise buffers surrounding the airport are considered the most effective means of protecting "their" operations (WARMP p 12-23).

72 R L Hegley, evidence-in-chief, para 5 [Environment Court document 25].

Noise (Chapter 22)

[42] Chapter 22 of the district plan essentially provides for the protection of communities from noise which may raise health concerns. The objective and most relevant policies are those in subchapter 22.3 which state:

Objective 1	Protection of individual and community health, environmental and amenity values from disturbance, disruption or interference by noise.
Policy 1.1	Avoid, remedy or mitigate community disturbance, disruption or interference by noise within coastal, rural and urban areas.
Policy 1.2	Include techniques to avoid the emission of excessive or unreasonable noises within the design of any proposal for the development or use of resources.
Policy 1.3	Accommodate inherently noisy activities and processes which are ancillary to normal activities within industrial and rural areas.

...

Subdivision (Chapter 23)

[43] We were referred to a number of policies in this chapter. Policy 1.6 requires decision-makers to "recognise the potential for amenity conflict between the rural environment and the activities on the urban periphery". Similarly policy 1.8 is to: "consider the effects of subdivision on the rural environment in so far as this contributes to the character of the Plan Area, and avoid or mitigate any adverse effects". Policy 23.4.1.1.11 is "to ensure that any adverse effects of subdivision on the functioning of services and other infrastructure and on roading are avoided, remedied or mitigated". We consider these policies are to be applied when a subdivision application or consent for land use is being applied for. They are not relevant when the rezoning of land is being considered. There is a plethora of policies — as identified above — to be considered already.

Rules

[44] For completeness we record that in the volume of rules[73], section 44 sets out the rules in the Airport Zone. These apply to Omaka airfield. The usual aviation activities are permitted activities[74]. Woodbourne Airport has its take-off and landing paths protected on the Planning Maps in accordance with Map 213 'Airport Protection and Designation 2'. Omaka airfield's flight paths are set out in a rule[75] rather than in a map.

2.3 NZS 6805: the Air Noise Standard

[45] It will be recalled that the methods of implementation in the district plan expressly contemplate application of the New Zealand Standard ("NZS 6805:1992") called "Airport Noise Management and Land Use Planning". That includes as the main recommended methods of airport noise management[76]:

73 WARMP Vol 2.
74 Rule 44.1.1 [WARMP Vol 2 p 44-1].
75 Rule 44.1.4.2.2 [WARMP Vol 2 p 44-3].
76 NZS 6805 para 1.1.5.

(a) ... establish[ing] maximum levels of aircraft noise exposure at an Airnoise Boundary, given as a 24 hour daily sound exposure averaged over a three month period (or such other period as is agreed).

(b) ... establish[ing] a second, and outer, control boundary for the protection of amenity values, and prescribes the maximum sound exposure from aircraft noise at this boundary.

[46] In relation to the latter, NZS 6805 explains:

1.4.2 *The outer control boundary*

1.4.2.1
The outer control boundary defines an area outside the airnoise boundary within which there shall be no new incompatible land uses (see table 2).

1.4.2.2
The predicted 3 month average night-weighted sound exposure at or outside the outer control boundary shall not exceed 10 Pa^2s (55 Ldn).

[47] NZS 6805 then describes how to locate the two boundaries. The two important points for present purposes are that once the technical measurements and extrapolations have been made, the decision as to where to locate the two boundaries is made under the procedures[77] for preparation of district plans under the RMA; and, secondly, that evaluative (normative) decisions have to be made by the local authority under clause 1.4.3.7 as to whether the predicted contours at the chosen date in the future are a "reasonable basis for future land use planning", taking into account a wide range of factors.

[48] For completeness we record that the standard then refers to two tables which are explained in this way[78]:

1.8 Explanation of tables

C1.8.1
All considerations of annoyance, health and welfare with respect to noise are based on the long term integrated adverse responses of people. There is considerable weight of evidence that a person's annoyance reaction depends on the average daily sound exposure received. The short term annoyance reaction to individual noise events is not explicitly considered since only the accumulated effects of repeated annoyance can lead to adverse environmental effects on public health and welfare. Thus in all aircraft noise considerations the noise exposure is based on an average day over an extended period of time — usually a yearly or seasonal average. (Further details may be obtained from US EPA publication 500/9-74-004 "Information on levels of environmental noise requisite to protect public health and welfare with an adequate margin of safety").

77 Schedule 1 to the RMA.
78 Para 1.8 NZS 6805.

Table 2

[49] A Table 2 is then introduced as follows[79]:

> Table 2 enumerates the recommended criteria for land use planning within the outer control boundary i.e. 24 hour average night-weighted sound exposure in excess of 10 Pa^2s.

Table 2 states:

> RECOMMENDED NOISE CONTROL CRITERIA FOR LAND USE PLANNING INSIDE THE OUTER CONTROL BOUNDARY BUT OUTSIDE THE AIR NOISE BOUNDARY

Sound exposure Pa^2s (1)	Recommended control measures	Day/night level Ldn (2)
>10	New residential, schools, hospitals or other noise sensitive uses should be prohibited unless a district plan permits such uses, subject to a requirement to incorporate appropriate acoustic insulation to ensure a satisfactory internal noise environment. Alterations or additions to existing residences or other noise sensitive uses should be fitted with appropriate acoustic insulation and encouragement should be given to ensure a satisfactory internal environment throughout the rest of the building.	>55

> NOTE –
>
> (1) Night-weighted sound exposure in pascal-squared-seconds or "pasques".
>
> (2) Day/night level (Ldn) values given are approximate for comparison purposes only and do not form the base for the table.

[50] There is a problem as to what Table 2 means. The MDC's Commissioners wrote[80]:

> There appear ... to be two alternatives we should consider viable:
>
> (a) that the qualification after the word *unless* only applies if the District Plan presently permits residential activity within the OCB. In such a case the Standard does not consider that the existing 'development rights' attaching to the land should be withdrawn on acoustic grounds alone. In such a case mitigation will be a sufficient response; or
>
> (b) that the qualification after *unless* applies to both existing and new district plan provisions where new residential activity is proposed subject to appropriate acoustic insulation.

They preferred the first interpretation[81].

[51] We are reluctant to step into this debate. It is not our task to establish an outer control boundary in this proceeding and so we do not need to establish the correct meaning of the Standard. We consider the proper approach to the standard is to use it as

79 Para 1.8.3 NZS 6805.
80 Commissioners' Decision para 118 [Environment Court document 1.2].
81 Commissioners' Decision para 119 [Environment Court document 1.2].

a guide — always bearing in mind, as we have said, that the standard itself involves value judgements as to a range of matters.

2.4 Plan Changes 64 to71

[52] Following the Southern Marlborough Urban Growth ("SMUGS") process the council notified Plan Changes 64-71 ("PC64-71") to rezone areas to meet the demand for residential land. CVL is a submitter in opposition.

[53] As noted by the Omaka Group, these plan changes do not form part of the matters the court is to consider in terms of the legal framework although the need for residential land was one argument put forward in support of PC59[82]. It is submitted by the Omaka Group that, given any future residential shortage will be addressed by PC64 to 71, the court should be cautious in giving weight to the effect of PC59 on this need[83]. For its part the council says that while that may be the case the court must still make its decision in the context of the relevant planning framework[84]. Notification of PC64 to 71 is a fact and that process is to be separately pursued by the council[85]. While there is no guarantee the plan changes will become operative in their notified form, they are — at most — a relevant consideration under section 32 of the RMA. PC64 to 71 are of very limited assistance to the court since these plan changes are at a very early stage in their development. They had not been heard, let alone, confirmed by the council at the date of the court hearing.

3. What are the benefits and costs of the proposed rezoning?

3.1 Section 32 RMA

[54] Under section 290 of the Act, the court stands in the shoes of the local authority and is required to undertake a section 32 evaluation.

[55] Section 32(1) to (5) of the Act, in its form prior to the 2013 amendments[86], states (relevantly):

> 32 Consideration of alternatives, benefits, and costs
>
> (1) In achieving the purpose of this Act, before a ... change, ... is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by —
> (a) ...
> (b) ...
> (ba) ...

82 Closing submissions for Omaka Group, dated 11 October 2013 at [26].
83 Closing submissions for Omaka Group, dated 11 October 2013 at [29].
84 Closing submissions for Marlborough District Council, dated 4 October 2013 at [72].
85 Closing submissions for Marlborough District Council, dated 4 October 2013 at [48].
86 Schedule 12 clause 2 Resource Management Amendment Act 2013: If Part 2 of the amendment Act comes into force on or after the date of the last day for making further submissions on a proposed policy statement or plan (as publicly notified in accordance with clause 7(1)(d) of Schedule 1), then the further evaluation for that proposed policy statement or plan must be undertaken as if Part 2 had not come into force.

(c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of Schedule 1); or
(d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of the Schedule 1.

(2) A further evaluation must also be made by —
(a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
(b) ...

(3) An evaluation must examine —
(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
(b) whether having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of the examinations referred to in subsections (3) and ... an evaluation must take into account —
(a) the benefits and costs of policies, rules, or other methods; and
(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

[56] Mr T G Quickfall, a planner called by CVL, gave evidence that he prepared PC59 including its section 32 analysis[87]. He relied on that in his evidence-in-chief[88], writing "I am confident that section 32 has been met". To the opposite effect Ms J M McNae, a consultant planner called by the council, stated that the section 32 analysis was "inadequate"[89]. The other planners who gave evidence[90] did not write anything about the plan change in relation to section 32.

3.2 The section 32 analysis in the application for the plan change

[57] In fact, the analysis in the application for the plan change is confusing. Table 2[91] commences by referring to the appropriateness under section 32 of three objectives (in chapters 11, 19 and 23 respectively). However, PC59 does not seek to change any objectives or to add any new ones so that analysis is irrelevant.

[58] Slightly more usefully the next table in the application then contains[92] a qualitative comparison of the benefits and costs. In summary the Table stated that the proposed changes to explanation; policies, rules and other methods would lead to these benefits: better provision for urban growth, alignment with urban design principles, implements growth strategy and land availability report, implements NZS 4404:2010, provides for more flexible road design and more efficient layout, reduces hard surfaces,

87 Section 4 of the proposed plan change dated 28 April 2011.
88 T G Quickfall, evidence-in-chief para 30 [Environment Court document 18].
89 J M McNae, evidence-in-chief para 40 [Environment Court document 28].
90 M J G Garland, M A Lile, P J Hawes and M J Foster.
91 Proposed Plan Change 28 April 2011 p 25.
92 Proposed Plan Change 28 April 2011 p 26.

increases residential amenity through wider choice of roading types, and recognises Omaka airfield as regional facility and avoids reverse sensitivity effects.

[59] The only costs were the costs of the plan change in his view.

[60] Similarly, the application identified[93] the benefits of the proposed zoning as being:

- provides for immediate to short term further growth and residential demand;
- wider range of living and location choices;
- implements urban design principles;
- enables continued operation of Omaka and avoids reverse sensitivity effects; and
- improved connections to Taylor River Reserve.

The costs identified were "the replacement of rural land use with residential land use".

[61] The application for the plan change identifies it as being more efficient and effective although what PC59 is being compared with is a little obscure — presumably the status quo. That analysis merely makes relatively subjective assertions which are elaborated on more fully in the planners' evidence. It would have been much more useful if the section 32 report or the evidence had contained quantitative analysis. As the court stated — of section 7 rather than section 32 of the RMA, but the same principle applies — in *Lower Waitaki Management Society Incorporated v Canterbury Regional Council*[94]:

> ... it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act.

[62] Section 4 of the application for the plan change then assessed[95] the following "alternative means for implementing the applicant's intentions":

> ...
> (i) Do nothing.
> (ii) Apply for resource consent(s).
> (iii) Initiate a plan change.
> (iv) Wait for the final growth strategy.
> (v) Wait for a council initiated plan change ...

---

93 Proposed Plan Change 28 April 2011 Table 3 p 26.

94 *Lower Waitaki Management Society Incorporated v Canterbury Regional Council* Decision 080/09 (21 September 2009).

95 Application for plan change 28 April 2011 pp 27-58.

We have several difficulties with that. First, we doubt if (i) or (v) would implement the applicant's intentions. Second, the application is drafted with reference to a repealed version of section 32.

3.3 Applying the correct form of section 32 to the benefits and costs

[63] The applicable test is somewhat different. As noted earlier, from 1 August 2003, with minor subsequent amendments, section 32 (in the form we have to consider[96]) requires an examination[97] of whether, having regard to their efficiency and effectiveness, the policies and methods are the most appropriate for achieving the objectives. Then subsection (4) reads:

> (4) For the purposes of the examinations referred to in subsection (3) and (3A) an evaluation must take into account —
>
> (a) the benefits and costs of policies, rules, or other methods; and
>
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

The reference to "alternative means" has been deleted, so read by itself, the applicable version of section 32(4) looks as if a viability analysis — are the proposed activities likely to be profitable? — might suffice. Certainly section 32 analyses are often written as if applicants think that is what is meant. However, the purpose of the benefit/cost analysis in section 32(4) is that it is to be taken into account when deciding the most appropriate policy or method under (here) section 32(3). The phrase "most appropriate" introduces (implicitly) comparison with other reasonably possible policies or methods. Normally in the case of a plan change, those would include the status quo, i.e. the provisions in the district plan without the plan change. Here, as we have said, the recently notified PC64 to 71 are also relevant as options.

[64] Given that the relevant form of section 32 contains no reference to alternatives, the applicant questioned the legal basis for considering alternative uses of the land. Counsel referred to *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Co. Ltd*[98] where Dobson J stated:

> If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

Given that the High Court decision in that proceeding was appealed direct to the Supreme Court (with special leave) we prefer to express only brief tentative views on the law as to alternatives under section 32. First, that 'most appropriate' in section 32

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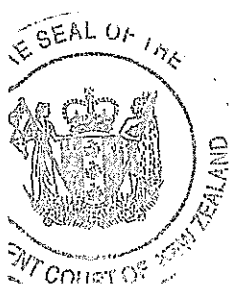
96 It was amended again on 3 December 2013 by section 70 Resource Management Amendment Act 2013.

97 Section 32(3) RMA.

98 *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Company Limited* [2013] NZRMA 371 at [171] (HC).



suggests a choice between at least two options (or, grammatically, three). In other words, comparison with something does appear to be mandatory. The rational choices appear to be the current activity on the land and/or whatever the district plan permits. So we respectfully agree with Dobson J when he stated that consideration of yet other means is not compulsory under the RMA. We would qualify this by suggesting that if the other means were raised by reasonably cogent evidence, fairness suggests the council or, on appeal, the court should look at the further possibilities.

[65] Secondly a review of alternative uses of the resources in question is required at a more fundamental level by section 7(b) of the RMA. That requires the local authority to have particular regard to the "efficient use of natural and physical resources". The primary question there, it seems to us, is which, of competing potential uses put forward in the evidence, is the more efficient use. We consider that later.

[66] For those reasons, Mr Quickfall was not completely wrong to rely on the analysis in section 4 of the application for the plan change when he relied on its qualitative comparison of alternatives. However, as we have stated the analysis is not, in the end, particularly useful because it adds little to the analysis elsewhere more directly stated in his and other CVL witnesses' evidence-in-chief.

[67] The only planner to respond in detail on section 32 was Ms McNae for the council. Her analysis[99] is as unhelpful as Mr Quickfall's for the same reason: it repeats subjective opinions stated elsewhere[100]. We will consider their differences in the context of the next section 32 question, to which we now turn.

4. What are the risks of approving PC59 (or not)?

4.1 Introducing the issues

[68] The second test in section 32 is to consider the risks of acting (approving PC59) or not acting (declining PC59) if there is insufficient certainty or information. We bear in mind that when considering the future, there is almost always some practical uncertainty about possible future environments beyond a year or two. A local authority or, on appeal, the Environment Court has to make probabilistic assessments of the "risk", recalling that a risk is the product of the probability of an event and its consequences (see *Long Bay Okura Great Park Society v North Shore City Council*[101]).

[69] The evidence on the risks of acting[102] (i.e. approving PC59) was that the experts were agreed that the following positive consequences are likely:

99 J McNae, evidence-in-chief para 53 [Environment Court document 28].
100 e.g. J McNae, evidence-in-chief para 54 [Environment Court document 28].
101 *Long Bay Okura Great Park Society v North Shore City Council* A078/2008 at [20] and [45].
102 See section 32(4) RMA.

(a) urgent demand for housing will be (partly) met[103];

(b) the site has positive attributes[104] for all the critical factors for residential development except for one. That is, the soils and geomorphological conditions and existing infrastructure and stormwater systems are all positive for such development. The exception is that the consequences for the roading network and other transport factors would be merely neutral;

(c) of the (merely) desirable factors[105], the site only shows positively on one factor — the proximity of recreational possibilities. It is neutral in respect of community, employment and ecological factors, and is said to be negative in respect of landscape although we received minimal evidence on that point;

(d) although the potential to develop land speedily is not a factor referred to in the district plan, we agree with CVL that it is a positive factor that the land is in single ownership and could be developed in a co-ordinated single way. The 2010 Strategy recognised[106] that with the anticipated growth rates the site might be fully developed within 3.5 years.

[70] The negative consequences of approving PC59 are likely to be:

(a) that versatile soils would be removed from productivity;
(b) that some rural amenities would be lost;
(c) that an opportunity for 'employment' zoning would be lost;
(d) there is the loss of a buffer for the Omaka airfield;
(e) there may be adverse effects on future use of Omaka airfield.

[71] The risks of not acting (i.e. refusing PC59) are the obverse of the previous two paragraphs.

[72] Few of the witnesses seemed much concerned with loss of rural productivity. As Mr Quickfall recorded[107] the site contains 21 hectares, and the Rural 3 Zone as a whole covers 17,100 hectares. Development of the whole site would displace 0.1228% from productive use. We prefer his evidence to that of Ms McNae.

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103 Transcript p 427 (Cross-examination of Mr Bredemeijer).
104 South Marlborough Urban Growth Strategy May 2010 — summarised in T G Quickfall, evidence-in-chief Table 1 at para 25 [Environment Court document 18].
105 T G Quickfall, Table 1, evidence-in-chief at para 25 [Environment Court document 18].
106 2010 Strategy para 120.
107 T G Quickfall, evidence-in-chief para 54 [Environment Court document 18].

[73] On the effects of PC59 on rural character and amenity, again we accept the evidence of Mr Quickfall[108] that the site and its surroundings are not typical of the Rural 3 Zone. Rather than being surrounded by yet more acres of grapevines, in fact the site has sealed roads on three sides[109], beyond which are residential zones and some houses on two sides, and the Carlton Corlett land to the south. We accept that rural character and amenity are already compromised[110].

[74] The remaining questions raised by the evidence are:

- what is the supply of, and demand for, employment land?
- what is the reasonably foreseeable residential supply and demand in and around Blenheim?
- what is the current intensity of use, and the likely growth of the Omaka and Woodbourne airports?
- what effects would airport noise have on the quantity of residential properties demanded and supplied in the vicinity of the airports?

4.2 Employment land

[75] Obviously the risk of not meeting demand for industrial or employment land is reduced if there is already a good supply of land already zoned. There was a conflict of evidence about this, but before we consider that, we should identify the documents relied on by all the witnesses.

The Marlborough Growth Strategies

[76] In relation to the CVL land, all the planning witnesses referred to the fact that the MDC has been attempting to develop a longer term growth "strategy" which considers residential and employment growth. There are three relevant documents:

- the "Southern Marlborough Urban Growth Strategy" ("the 2010 Strategy") (this is the 2010 Strategy already referred to);
- the "Revision of the Strategy for Blenheim's Urban Growth" ("2012 Strategy")[111];
- the "Growing Marlborough ... district-wide ..." ("2013 Strategy").

It should be noted that the three strategies cover different areas — Southern Marlborough, Blenheim, and the whole district respectively. Further, as Mr Davies reminded us these documents are not statutory instruments.

[77] As we have recorded, PC59 was strongly influenced by the 2010 Strategy, so CVL was disappointed when the 2010 Strategy, after being put out for public

108 T G Quickfall, evidence-in-chief paras 57 and 58 [Environment Court document 18].
109 T G Quickfall, evidence-in-chief para 57 [Environment Court document 18].
110 T G Quickfall, evidence-in-chief para 58 [Environment Court document 18].
111 C L F Bredemeijer, evidence-in-chief Appendix 3 [Environment Court document 21].

consultation, was revised by the subsequent strategies. The council pointed out that, while the 2010 Strategy was relevant in terms of PC59, it had not undergone the process set out in Schedule 1 of the RMA and so was always subject to change[112].

[78] For the reasons given in the 2013 Strategy, Colonial's site (and its proposed PC59) was set aside as an option for Residential zoning and the matter left for this court to determine.

The council's approach

[79] Mr C L F Bredemeijer, of Urbanismplus and on behalf of the council, was the project manager and report author during the processes leading to the three Marlborough Growth Strategies[113]. He, in turn, engaged Mr D C Kemp, an economist and employment and development specialist, to investigate employment and associated land issues for the Marlborough region[114].

[80] In Mr Kemp's view the traditional rural services at present around the Blenheim town centre should be relocated and provision made for future growth in employment related activities which should be located away from the town centre. The CVL site, according to Mr Kemp, offers "an exceptional opportunity" for accommodating these activities[115]. He saw a need to protect the site as strategic land for existing, new and future oriented business clusters[116].

[81] To quantify the need for employment land up to the year 2031 Mr Kemp considered two scenarios. The first he called the Existing Economy Scenario and the second, a realistic Future Economy Scenario. The latter includes, in addition to all factors considered in the Existing Economy Scenario, consideration of the perceived shortfall in industrial land uses where Marlborough currently has less than expected employment ratios and provides for relocation of existing inappropriately located activities[117]. For the period 2008 to 2031 the Existing Economy Scenario led to a requirement for 69 hectares of employment land with 120 hectares required for the Future Economy Scenario[118]. These represent growth rates of 3.0 and 5.2 hectare/year respectively.

[82] Mr Kemp's figures were incorporated into the 2010 Strategy, being referred to as the "minimum" and the "future proofed" requirements[119]. The latter required:

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112 Closing submissions for Marlborough District Council, dated 4 October 2013 at [24].
113 C L F Bredemeijer, evidence-in chief para 7 [Environment Court document 21].
114 D C Kemp, evidence-in-chief para 7 [Environment Court document 20].
115 D C Kemp, evidence-in-chief paras 11–19 [Environment Court document 20].
116 D C Kemp, evidence-in-chief para 26 [Environment Court document 20].
117 D C Kemp, evidence-in-chief paras 31 and 35 [Environment Court document 20].
118 D C Kemp, evidence-in-chief paras 33 and 36 [Environment Court document 20].
119 Southern Marlborough Growth Strategy 2010, p 108.

- 63 hectares for small scale Clean Production and Services;
- 7 hectares for Vehicle Sales and Services;
- 24 hectares for larger-scale Transport and Logistics; and
- 30 hectares for other "Difficult to Locate" activities with low visual amenity and potentially offensive impacts.

The 2010 Strategy then notes: "There is clearly sufficient employment land in Blenheim to meet all of these potential needs with the exception of "... 5 ha ..."". The 5 ha refers to land for "difficult to locate activities" which Mr Kemp acknowledged would be inappropriate to place on the site[120].

[83] Following the 2010 and 2011 Christchurch earthquakes the council sought reports on liquefaction prone land in the vicinity of Blenheim. The reports raised serious concerns about the suitability of some of the land identified for development in the 2010 Strategy. (No liquefaction issues were identified with respect to the site). The council recognised that there would be a severe shortfall of residential and employment land in Blenheim[121] assuming no change to the demand for employment land. Instead of there being "clearly sufficient" land for employment purposes there was now a shortfall of approximately 85 hectares[122]. Mr Hawes, planner for the council, appeared to accept this figure[123]. The court has no reason to dispute it and thus accepts it as the best estimate of employment land required to future proof Blenheim in this regard until 2031.

[84] To meet the perceived shortfall of 85 hectares, revised strategies for provision of employment land identified a preference for employment land development near Omaka and Woodbourne airports. That near Omaka included the site, which was identified in the 2010 Strategy for residential use[124] and the Carlton Corlett Trust land to its south[125]. This was seen as a logical progression of employment land north from the Omaka airport to New Renwick Road and as a solution to noise issues. These preferences were carried through to the 2013 Strategy which was released in March 2013 and ratified by the full council on 4 April 2013[126]. We note that neither CVL as the site's land owner nor adjacent residential owners and occupiers[127] were consulted about this change in preference from residential to industrial[128].

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120 D C Kemp, evidence-in-chief para 25 [Environment Court document 20].
121 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].
122 C L F Bredemeijer, evidence-in-chief para 37 [Environment Court document 21].
123 P J Hawes, evidence-in-chief para 36 [Environment Court document 22].
124 P J Hawes, evidence-in-chief Figure 1 [Environment Court document 22].
125 P J Hawes, evidence-in-chief para 37.3 [Environment Court document 22].
126 P J Hawes, evidence-in-chief paras 44 and 46 [Environment Court document 22].
127 There are 84 adjacent residential properties, 31 of which face the site along New Renwick Road and Richardson Avenue.
128 C L F Bredemeijer, evidence-in-chief paras 44-46 [Environment Court document 21].

[85] The 2013 Strategy summarised planning over the last 5 or 10 years for urban growth as follows[129]:

> Land use and growth
> The original Southern Marlborough Urban Growth Strategy Proposal catered for residential and employment growth in a variety of locations on the periphery of Blenheim, including the eastern periphery. As explained earlier, the areas to the east of Blenheim were removed from the Strategy as a result of the significant risk and likely severity of the liquefaction hazard. This decision was made by the Environment Committee on 3 May 2012.
>
> The Strategy now focuses residential growth to the north, north-west and west of Blenheim and employment growth to the south-west. In this way, the Strategy will provide certainty in terms of the appropriate direction for growth for the foreseeable future.
>
> The Strategy, including the revision of Blenheim's urban growth, is based on the sustainable urban growth principles presented in Section 2.1. In assessing the suitability of these sites, it was clear that residential activity would encroach onto versatile soils to the north and north-west of Blenheim. The decision to expand in this direction was not taken lightly. However, given the constraints that exist at other locations, the Council did not believe it had any other options to provide for residential growth. The decision was made also knowing that land fragmentation in some of the growth areas had already reduced the productive capacity of the soil.

[86] In summary, the council's strategic vision with respect to provision of employment land is set out in the 2013 Strategy as[130]:

- a further 64 hectares for future general and large scale industry in the Riverlands area;
- additional employment land near the Omaka Aerodrome (53 hectares) and the airport at Woodbourne (15 hectares);
- possible future business parks near Marlborough Hospital, near Omaka and near the airport at Woodbourne.

[87] However, the 2013 Strategy expressly left open the future appropriate development of the (Colonial) site[131]:

> W2 (or Colonial Vineyard site)
> During the process of considering submissions on W2, the owners of the land requested a plan change to rezone the property Urban Residential to facilitate the residential development of the site. The Council declined to make a decision on this growth area to ensure there was no potential to influence the outcome of the plan change process. Given the delay caused by the liquefaction study and the subsequent revision, the plan change request has now been heard by Commissioners and their decision was to decline the request. This decision has been appealed to the Environment Court by the applicant. This appeal will be heard during 2013.
>
> Due to the effect of the liquefaction study on the strategy and the areas it identified for employment opportunities to the east of Blenheim, other areas have now been assessed in terms of their suitability for employment uses. This includes the W2 site and adjoining land in the vicinity of Omaka Aerodrome. Refer to the employment land section below for further details.

129 Page 36 of the 2013 Strategy.
130 2013 Strategy, p 30.
131 C L F Bredemeijer, evidence-in-chief Appendix 4 [Environment Court document 21].

> It is noted that if the plan change request is approved by the Court, the subsequent development of the rezoned land will assist to achieve the objectives of this strategy. If the Court does not approve the plan change then the Council will be able to promote Area 8 as an alternative.

CVL's approach

[88] Mr Kemp's approach was challenged by the applicant's witnesses on the grounds that:

- much industrial expansion and new employment occurs in the rural zone as discretionary activities. This reduces the need for industrial zoning. This factor was not mentioned by Mr Kemp[132];
- Mr Kemp's projections require an additional 3,650 employees to support them while Statistics New Zealand's projection of population growth for the same period is 2,700 persons[133];
- use of only one year's data on which to base projections is inappropriate. That the year is a boom year, 2008, and prior to the global financial crisis caused further concern[134].

[89] In predicting the future need for employment land CVL's witnesses preferred to consider the past take up of industrial land and to account for the areas of land available at present for employment land. They also considered which industries would be likely to develop on or relocate to the site. Mr T P McGrail, a professional surveyor, compared land use as delineated in a 2005 report to council with the existing situation for what he described as business and industrial uses. Noting the area of land available for these uses in 2005 was essentially the same as that available in 2013 he concluded the net take up of vacant land since 2005 has been "very low"[135]. As an example he records that in May 2008 54 hectares was rezoned at Riverlands but no take up of this land has occurred in the 5 years it has been available[136]. His evidence was that there have been three greenfield industrial subdivisions in the Blenheim area in the last 34 years of which 19 hectares has been developed[137]. This is at a rate of 0.56 hectares/year. That contrasts with the growth rates of 3.0 and 5.2 hectares/year adopted by Mr Kemp and noted above.

[90] In considering which industries may chose to locate or relocate to the site, Mr McGrail dismissed wet industries (on advice from the council) together with processing of forestry products and noxious industries including wool scouring and sea food processing on the basis of their effects on neighbouring residents[138]. Other employment uses discussed by Mr McGrail were aviation, large format retail and business. Due to

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132 T P McGrail, Rebuttal evidence paras 37 and 38 [Environment Court document 9A].
133 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
134 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
135 T P McGrail, Rebuttal evidence paras 3–6 [Environment Court document 9A].
136 T P McGrail, Rebuttal evidence para 33 [Environment Court document 9A].
137 T P McGrail, Rebuttal evidence paras 26 and 28 [Environment Court document 9A].
138 T P McGrail, Rebuttal evidence paras 8–10 [Environment Court document 9A].

the Carlton Corlett Trust land's proximity to the airfield it would be preferred to the site for aviation related industries. This 31 hectares together with 42 hectares designated as Area 10, located immediately to the northwest of Omaka airfield, gives 73 hectares of land better suited to employment (particularly aviation) uses than the site.

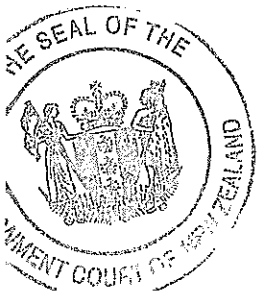
[91] Council has identified five areas, including the site, which are available for large format retail. Mr McGrail believed large format retail is well catered for even if the site becomes residential[139]. He also considered that some 50% of the types of business presently in Blenheim would not choose to locate or relocate to the site because they would lose the advantages that accrue by being close to main traffic routes and the town centre[140]. This underlay his skepticism of Mr Kemp's projections for business uptake of the site[141].

[92] Mr T J Heath, an urban demographer and founding Director of Property Economics Limited, was asked by CVL to determine if there was any justification for the council preferred employment zoning of the site[142]. To do so he assessed the demand for employment land using his company's land demand projection model. This uses Statistics New Zealand Medium Series population forecasts, historical business trends and accounts for a changing demographic profile in Marlborough. It first predicts increases in industrial employment which are then converted to a gross land requirement[143]. Use of this model to predict the need for future employment land was not challenged during the hearing.

[93] Industrial employment projections from the model suggested a 28% increase over the period 2013 to 2031 which translated to a gross land requirement of 49 hectares[144]. This result is considered by Mr Heath to be "towards the upper end of the required industrial land over the next 18 years". Two other scenarios are presented in his Table 3 each of which results in a smaller requirement[145]. Mr Heath then relied upon Mr McGrail's estimates of presently available employment land which totalled 103 hectares[146]. This comprised the 19 hectares identified by Mr McGrail and referred to above plus the 84 hectares of land available at Riverlands[147].

[94] During cross examination Mr Heath stated[148] "My analysis shows me you have zoned all the land required to meet the future requirements out to 2031". This was a reiteration of his rebuttal evidence where he wrote[149] "even at the upper bounds of

139 T P McGrail, Rebuttal evidence para 19 [Environment Court document 9A].
140 T P McGrail, Rebuttal evidence para 21 [Environment Court document 9A].
141 T P McGrail, Rebuttal evidence paras 21 and 22 [Environment Court document 9A].
142 T J Heath, Rebuttal evidence para 6 [Environment Court document 16].
143 T J Heath, Rebuttal evidence para 31 [Environment Court document 16].
144 T J Heath, Rebuttal evidence Table 3 [Environment Court document 16].
145 T J Heath, Rebuttal evidence paras 35and 36 [Environment Court document 16].
146 T J Heath, Rebuttal evidence Table 4 [Environment Court document 16].
147 T P McGrail, Rebuttal evidence Figure 2.
148 Transcript p 315.
149 T J Heath, Rebuttal evidence para 39 [Environment Court document 16].



49 hectares, there is clearly more than sufficient industrial land to meet Blenheim's and in fact Marlborough's future industrial needs ...".

Findings

[95] We ignore the 15 hectares near Woodbourne as this is Crown land that could form part of a Treaty settlement for Te Tau Ihu Iwi[150]. Its future is thus uncertain. The 53 hectares near Omaka includes the site (21.7 hectares) and the Carlton Corlett Trust land (31.3 hectares). The land owner of the latter has expressed a desire to develop the property to provide for employment opportunities[151]. Indeed, together the Carlton Corlett Trust land (31 hectares) and the further 64 hectares at Riverlands total 91.3 hectares. This is in excess of the 85 hectares sought by council for its future proofing to 2031.

[96] In addition to the lands listed above, council has identified 42 hectares of land (referred to as Area 10) to the west of Aerodrome road and north of the airfield for additional employment growth in the long term[152].

[97] The council strategy requires 89 hectares of employment land to future proof the need for such land in the vicinity of Blenheim. There is at present sufficient land available to provide for this without any rezoning. We conclude the need for employment land within a planning horizon of 18 years (to 2031) is not a factor weighing against the requested plan change.

4.3 Residential supply and demand

[98] Prior to 2011, there was a demand for between 100 and 150 houses a year and an availability of approximately 1,000 greenfield sites[153]. Based on that, counsel for the Omaka Group submitted there is no evidence that the alleged future shortfall will materialise before further greenfield sites are made available[154]. We are unsure what to make of that submission because counsel did not explain what he meant by "shortfall". There is not usually a general shortfall. Excess demand is an excess of a quantity demanded at a price. In relation to the housing market(s), excess demand of houses (a shortfall in supply) is an excess of houses demanded at entry level and average prices over the quantity supplied at those prices.

[99] Mr Hayward gave evidence for CVL that there has been "a subnormal amount of residential land coming forward from residential development in Marlborough"[155]. He also stated that there was an imbalance between supply and demand, with a greater quantity demanded than supply[156]. Further, none of the witnesses disputed Mr Hawes'

150 2013 Strategy, p 41.
151 2013 Strategy, p 40.
152 2013 Strategy, p 40.
153 Environmental Management Services Limited report, dated 11 January 2011.
154 Closing submissions for Omaka at [101].
155 A C Hayward, Transcript at p 98, lines 10-15.
156 A C Hayward, Transcript at p 103, lines 20-25.

evidence[157] that the Strategies are clear that there is likely to be a severe shortfall of residential land in Blenheim if more land is not zoned for that purpose.

[100] Plan Changes 64 to 71 would potentially enable more residential sections to be supplied to the housing market. However, in view of the existence of submissions on these plan changes, we consider the alternatives represented by those plan changes are too uncertain to make reasonable predictions about.

[101] We find that one of the risks of not approving PC59 is that the quantity of houses supplied in Blenheim at average (or below) prices is likely to decrease relative to the quantity likely to be demanded. That will have the consequence that house prices increase.

4.4 Airports

[102] In view of the importance placed on the Woodbourne Airport in the RPS, it was interesting to read the 2005 assessment by Mr M Barber in his report[158] entitled "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options". He wrote[159] of Omaka:

> The principal threats to the sustainable use of Omaka Aerodrome arise from its proximity to Woodbourne/Blenheim Airport, the potential for encroachment on the obstacle limitation surfaces, and urban or rural-residential encroachment.

[103] Currently Omaka aerodrome may expand its operations as a permitted activity. However, it is uncertain what restrictions or protection may be put in place for Omaka by way of a future plan change process and it is in this uncertain context that the court is asked to determine what the likely noise effects of the airfield will be in the future.

[104] The Omaka Group argued that, given the uncertainty around the air noise boundary and outer control boundary which are likely to be imposed in the future, it is helpful to have regard to the capacity of the airfield. Although, as Mr Day conceded in cross-examination[160], the capacity approach is unusual, the Omaka Group argued it is sensible in the context of uncertainty about the level of use to consider the capacity of the airfield. This would allow for full growth in the future, regardless of the current recession[161]. CVL responded that the capacity approach is an argument not advanced by any witness and so there is no evidence as to the capacity of the airfield[162].

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157 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].

158 P J Hawes, evidence-in-chief Appendix 2 [Environment Court document 22].

159 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 40. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

160 Transcript 501 line 3.

161 Closing submissions for Omaka at 81-82.

162 Closing submissions for Colonial Vineyards Ltd at 161.

[105] Mr Barber in his 2005 report wrote in relation to the potential for urban encroachment[163]:

> Clearly, there is considerable existing and future potential for urban residential development to the south-west of Blenheim which could result in encroachment on Omaka Aerodrome. To avoid possible adverse effects on the future safe and efficient operation of the aerodrome, it is important that the area likely to be subject to aircraft noise in the future be identified and appropriate protection measures be incorporated in the District Plan.

4.5 Noise

[106] In relation to the risks of acting when there is insufficient certainty and/or information about the subject matter of the policies or methods, we observe that the uncertainties are not about the current environment but about the environment in 15 or 25 years' time.

[107] Similarly the Marlborough Aviation Group was aware of the issue in 2008. As a former President, Mr J McIntyre, admitted in cross-examination[164], he wrote[165] of The Marlborough Aero Club Inc. in the President's Annual Report for 2008:

> The opening of the Airpark adjacent to the Aviation Heritage Centre is a positive aspect of this, but has thrown up some curly questions as to how operations should take place from this area. Concurrent with increased numbers of aircraft (of all types) is the concern that we will draw undue attention to ourselves with noise complaints, as we are squeezed by ever-increasing urban encroachment. On this front, it does not help that the District Council did not see fit to have the fact that airfield exists included in developer's information and LIM reports for the new sub division up Taylor Pass Road.

Current airport activity

[108] The site lies under the 01/19 vector runways[166] of the Omaka airfield. Thus it is subject to some noise from aircraft taxiing, taking off and landing. How much noise was a subject of considerable dispute.

[109] Two methods of assessing aircraft noise were put forward. CVL produced the evidence of Mr D S Park based on 2013 measurements and extrapolations. In December 2012 Mr Park had installed a system at the site for recording the radio transmissions made by pilots operating at Omaka. In this way he sought an understanding of aircraft noise data obtained at the site as described by Dr Trevathan[167] and to aid in the analysis of that data. In contrast the MDC and the aviation cluster initially relied on data collected at Woodbourne between 1997 and 2008 ("the Tower data"), extrapolated to the present. They later based their predictions out to 2039 on Mr Park's measurements, as discussed below.

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163 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 42. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

164 Transcript p 732 lines 15-20 (Tuesday 17 September 2013).

165 Exhibit 35.1.

166 i.e. runways on which aircraft taking off are on bearings of 10° and its reciprocal 190° (magnetic) respectively.

167 J W Trevathan, evidence-in-chief para 5.1 [Environment Court document 14].

[110] Mr Park's figures relied on the fact that at unattended aerodromes, such as Omaka, it is normal for pilots to transmit, by radio, a VHF transmission, their intentions to take off or to land and their intended flight path. While this is a safety procedure it also provides a record of movements to and from the aerodrome. Once recorded on Mr Park's equipment the VHF transmissions were analysed to provide[168]:

- the number of takeoffs and landings by radio equipped aircraft at Omaka during the recording period;
- the approximate time of each movement;
- the runway used during each movement; and
- the aircraft registration.

An aircraft's registration allows it to be identified and thus categorised as either a helicopter or a fixed wing aircraft and, if the latter, as having either a fixed or a variable pitch propeller. This is necessary as the two types have different noise signatures with the variable pitch propellers being the louder. Helicopters are noiser again.

[111] The runway information suggests which movements are likely to have resulted in a noise event being recorded by the equipment on the site.

[112] At the time of filing his evidence-in-chief (22 February 2013) Mr Park had data from the period 10 January – 9 February 2013 only, which he acknowledged[169] was "a relatively short time". His rebuttal evidence filed on 3 July 2013 reported on data from the period 10 January – 8 April 2013. Data from the Easter Air Show was not captured as that used a different transmission frequency[170]. Data from 81 days was analysed, there being over 30,000 transmissions of which 7,553 related to movements at Omaka: 7,082 were fixed wing aircraft and 471 were helicopters.

[113] The results of Mr Park's monitoring were given as[171]:

• average fixed wing movements/day	87.4
• average fixed wing movements/night	0.8
• average helicopter movements/day	5.8
• average helicopter movements/night	0.6
• average use of runway 01 for takeoffs	26%
• ratio fixed pitch/variable pitch	84%/16%

168 D S Park, evidence-in-chief para 4.6 [Environment Court document 13].
169 D S Park, evidence-in-chief para 5.8 [Environment Court document 13].
170 D S Park, Rebuttal evidence para 11.2 [Environment Court document 13A].
171 D S Park, Rebuttal evidence para 11.4 [Environment Court document 13].

These numbers are subject to error from a number of causes including aircraft not equipped with radio, pilots choosing not to transmit their intentions, or by confusion of call signs. Mr Park chose to account for this by adding 10% to the recorded numbers: some 750 extra movements[172]. He also added 1.1 helicopter movements/night to reflect a suggestion from Mr Dodson that some night helicopter movements had been missed[173]. Whether this was before or after the 10% increase was not stated. The results of these adjustments[174] are given in terms of averages per day as:

- fixed wing 96.1
- helicopter 8.0

Mr Park noted[175] that the entry for helicopters should have been 7.5 flights per day. The quoted figure of 8.0 was retained by Mr Park and used in his subsequent projections of future helicopter movements.

[114] These figures are difficult but not impossible to understand. In summary:

- the figure of 96.1 fixed wing flights is an increase of 10% on the recorded figure for fixed wing movements/day of 87.4. The night movements of fixed wing aircraft are thus not included in the adjusted figures. We infer that the term "averages per day" used in connection with these figures means day time flights only;

- the figure of 7.5 helicopter flights can be obtained by increasing the recorded 5.8 day time helicopter flights by 10% and then adding 1.1. However this is mixing day and night flights and may well be a coincidence. For day flights only a 10% increase gives 6.4 flights, a figure that would fit into the averages per day table above. If the total of recorded day time plus night time helicopter flights (6.4) is increased by 10% and 1.1 flights added the result is 8.1 flights, a figure close to that used by Mr Park in his projections;

- of the fixed wing movements only those takeoffs from Runway 01 are assumed by Mr Park to result in noise effects on the site[176]. He reports 26.2% of day time fixed wing movements and 2.8% of fixed wing night time movements occur on Runway 01. Of the helicopter movements 25% of those departures to the north from Runways 01 and 07 together with 16.1% of those arrivals from the north on Runways 19, 25 and 30 were considered by Mr Park to have a noise effect on the site.

172 D S Park, Supplementary evidence para 3.4 [Environment Court document 13B].
173 D S Park, Rebuttal evidence para 11.6(b) [Environment Court document 13A].
174 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].
175 Transcript p 143 lines 21-24.
176 D S Park, Rebuttal evidence para 11.12 [Environment Court document 13A].

[115] Dr Trevathan was asked[177] to provide a current 55 dB Ldn contour based on Mr Park's data from the period 10 January to 8 April 2013 for aircraft movements that affect the site. This contour is shown as crossing the Carlton Corlett land in a generally east/west direction and at least 180 metres from the site[178]. We find that helicopters departing and arriving fly directly[179] over the site at present. Dr Trevathan's modeling confirms that these flights make a significant contribution to the average noise levels experienced on the site. Similarly, flight paths for departures and arrivals from the east — on the 07/29 vector runways — lie directly over the residential area to the east of Taylor River[180].

[116] Mr A Johns, a member of the Marlborough Aero Club, challenged the reliability of Mr Park's VHF recordings and the data derived from them. He was concerned about the presence of unrecorded aircraft movements which included those by aircraft not equipped with radios, movements which the pilot chose not to report and those associated with the Air Show held at Easter 2013. Possible misidentification of aircraft type which would lead to an incorrect noise signature being assigned and the percentage of movements allocated to Runway 01 were other concerns. Mr Johns' information was based on his knowledge of actual use of Omaka airfield from, presumably, records held by the Marlborough Aero Club. Mr Park through his company, Astral Limited, sought access to these records[181] which would have allowed him to assess the accuracy of his VHF results. This request was declined[182] as the Omaka Group and the Aero Club did not consider the request "had merit". We note that Mr Johns did not produce any of these records in his evidence preferring simply to give aircraft types and movement percentages that cannot be verified. Since the Marlborough Aero Club did not cooperate with Mr Park's reasonable request, we prefer the latter's evidence.

[117] With respect to the flights associated with the Air Show Mr Park, based on his experience as chair of the Ardmore Airport Noise Committee, expressed the view that these would be excluded from any noise evaluation and expressly provided for in any Noise Management Plan that the Aero Club might produce and in any special recognition the council may wish to give the Air Show in the District Plan[183].

[118] Mr Johns gave a list[184] of historic aircraft which were misidentified as modern aircraft. Having been identified by Mr Park the movements made by these aircraft would have been recorded and thus included in the total number of movements. It is

177 J W Trevathan, Rebuttal evidence para 3.1 [Environment Court document 14A].
178 J W Trevathan, Supplementary evidence Attachment 2 [Environment Court document 14B].
179 D S Park, evidence-in-chief para 65 [Environment Court document 13].
180 D S Park, evidence-in-chief Annexure 3, Figures 5 and 6 [Environment Court document 13].
181 D S Park, Supplementary evidence para 3.1 and Exhibit A [Environment Court document 13B].
182 D S Park, Supplementary evidence para 3.1 and Exhibit B [Environment Court document 13B].
183 D S Park, Rebuttal evidence para 8.2 and Supplementary evidence para 3.23 [Environment Court documents 13A and 13B respectively].
184 A Johns, Supplementary evidence para 18 [Environment Court document 24A].

likely the assigned noise category would have been in error. Reference to 48 flights of an Avro Anson, a World War II bomber, that appeared to have been missed by Mr Park was made by Mr Johns[185]. In his oral evidence[186] he stated that subsequent to filing his written evidence he had identified that the bomber had used a call sign unknown to Mr Park and that at least half the bomber's flights had been recorded, but not recognised as such, by Mr Park.

[119] Another consideration which adds uncertainty is that the split between variable pitch and fixed pitch propeller aircraft will influence the location of any derived contour[187]. Mr Johns, from a "back of the envelope" calculation, suggested aircraft with variable pitch propellers make up close to 20% of the total fixed wing aircraft movements[188]. Mr Park's measurements over the three month period indicated a figure of 16%.

[120] Mr Park's recordings indicated runway 01 was used for 26.2% of the fixed wing takeoff movements[189]. Mr Johns, having made allowance for the interruption to movements on runway 01 from the Air Show, suggested 28% which he noted was closer to the estimate provided by Mr Sinclair for the modelling done by Mr Hegley for the council[190]. In taking all these perceived deficiencies in Mr Park's recording and analysis into account[191] Mr Johns believed "a greater level of error should be allowed for than the 10% suggested by Mr Park". No alternative figure was produced by Mr Johns. We found that the 10% increase in movements (over 700) allowed by Mr Park is more than sufficient to cover at most 24 flights (48 movements) by the bomber that may have been missed.

Findings

[121] We prefer Mr Park's data set to that of the Aero Club because the latter derives from flights at a period of unusually intense activity immediately prior to the global financial crisis. For example, on the numbers of flights in 2008, Mr J McIntyre wrote[192] in the President's Annual Report for 2008:

> After dipping slightly last year, flying hours were up again with 2288 hours chalked up for the Clubs 80th year. This is the highest since 1990/91 and is heartening in the face of rocketing fuel prices and escalating charges from all quarters.

The 2013 base data from Mr Park can be used to predict the location of noise contours near and over the site in 2038. The court is not charged with fixing these contours and indeed does not have sufficient information to do so. Rather, we are interested in the

185 A Johns, Supplementary evidence para 20 [Environment Court document 24A].
186 Transcript pp 525-526.
187 As recorded above: Variable pitch propellers are louder than fixed pitch propellers.
188 A Johns, Supplementary evidence para 30 [Environment Court document 24A].
189 D S Park, Rebuttal evidence para 11. 12 [Environment Court document 13].
190 A Johns, Supplementary evidence para 33 [Environment Court document 24A].
191 A Johns, Supplementary evidence para 43 [Environment Court document 24A].
192 Exhibit 35.1.

contours as an indication of what could happen in the next 25 years. For this purpose we are satisfied that Mr Park's data is an appropriate base from which to project forward.

Future noise

[122] In fact some attempts had been made to establish likely noise contours. The experts endeavoured to formulate a growth rate and applied it to the current use to calculate the contours which would restrict the airfield's growth. Mr Park and Dr Trevathan, the experts for CVL, adopted a compounding annual growth rate of 2.7% for fixed wing aircraft[193]. Mr Foster, for the council, gave unchallenged evidence that were a proposed World War II fighter squadron project to eventuate then a 4% per annum growth rate would be more realistic[194]. Looking at the Tower data one could calculate a compounding growth rate of 4.4%[195] which provides support for Mr Foster's proposed growth rate. Omaka submits that any certainty in the contours proposed by Dr Trevathan is diminished by the uncertainty around the flight numbers supplied by Mr Park[196].

[123] Parallel to the SMUGS process, the council commissioned reports from Hegley Acoustic Consultants as an initial step to introducing airnoise boundaries and outer control boundaries.

[124] Mr R Hegley, of Hegley Acoustic Consultants, was commissioned in 2007 to undertake acoustic modelling of Omaka airfield[197]. He based his model on data provided by Mr Sinclair[198] which included growth rates to determine aircraft numbers up to the selected design year of 2028. These growth rates were not recorded in Mr Hegley's evidence. Mr Park deduced, from Mr Sinclair's evidence to the initial hearing[199], that they were[200]:

- fixed wing 2.7% per annum
- helicopter 10% per annum

The projected values used by Mr Hegley to derive his 55 dB Ldn contour were not recorded in his evidence.

[125] Mr Park[201] used Mr Hegley's growth rates to project his one month of recorded movements out to 2028 and provided the data to Dr Trevathan for his derivation of the

193 Transcript at 178 line 32ff.
194 M J Foster, evidence-in-chief at [6.17] [Environment Court document 23].
195 A Johns, supplementary evidence at [12].
196 Closing submissions for Omaka at 53.
197 R L Hegley, evidence-in-chief para 5 [Environment Court document 25].
198 R L Hegley, evidence-in-chief para 17 [Environment Court document 25].
199 D S Park, evidence-in-chief Annexure 1A [Environment Court document 13].
200 D S Park, evidence-in-chief paras 5.12–5.16 [Environment Court document 13].
201 D S Park, evidence-in-chief, para 5.19 [Environment Court document 13].

resultant 55 dB Ldn contour. Doubt was expressed by Mr Park over the 10% growth rate for helicopters which he considered excessive[202].

[126] Initial projections used by Mr Hegley on behalf of the council were 20 year projections from 2008, i.e. out to 2028. In preparing for the hearing all witnesses agreed this was too short for airport planning and agreed 2038 to be an appropriate planning horizon. The rates of growth in fixed wing and helicopter movements were not agreed.

[127] With concern having been expressed by a number of witnesses in their evidence-in-chief over the inadequacy of a 2028 design year, attention turned to providing projections out to the agreed year of 2038. Mr Hegley was instructed by the council to project out to 2038 retaining the 2.7% and 10% per annum growth rates for fixed wing and helicopters respectively[203]. He was asked to use the aircraft flight numbers as presented in Dr Trevathan's evidence-in-chief[204]. These figures came from Mr Park and were thus based on his one month of VHF recorded data. At this point all use of the alternate data set favoured by the Airport Cluster and the Aero Club ceased.

[128] Mr Park also considered the 2038 design year. He retained the 2.7% growth rate to 2038 for fixed wing aircraft and used a 6.6% growth rate for helicopters both applied to his three month 2013 base data[205]. The latter he considered appropriate in view of the CAA helicopter registration records[206] which show a 4.4% per annum growth rate from 1993 until 2013 with a period (8 years) having a maximum growth rate of 7.8% per annum. The 6.6% rate is 50% above the long term growth rate and will result in almost five times as many helicopter movements in 2038 suggesting up to 35 helicopters will be operating from Omaka at that time. In Mr Park's view the 6.6% growth rate is adequate to account for the special nature of helicopter operations from Omaka[207]. The planning consultant[208] for the council, Mr Foster, who has extensive experience in airport planning, stated that the 2.7% growth rate for fixed wing aircraft is not unreasonable[209] and that 6.6% as a growth rate for helicopters is realistic[210].

[129] Using these growth rates and Mr Park's adjusted 2013 data for flight movements the projected movements for 2038 expressed as averages per day are[211]:

- fixed wing 187.1
- helicopter 39.7

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202 D S Park, evidence-in-chief, para 5.17 [Environment Court document 13].
203 R L Hegley, evidence-in-chief para 29 [Environment Court document 25].
204 R L Hegley, evidence-in-chief para 27 [Environment Court document 25].
205 D S Park, Rebuttal evidence, para 11.7 [Environment Court document 13].
206 D S Park, Rebuttal evidence Annexure 1 [Environment Court document 13A].
207 D S Park, Rebuttal evidence paras 11.9 and 11.10 [Environment Court document 13A].
208 M J Foster, evidence-in-chief paras 1.2 – 1.4 [Environment Court document 27].
209 M J Foster, evidence-in-chief para 6.27 [Environment Court document 27].
210 Transcript at 646 line 24.
211 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].

The percentages of these flights to affect the site were assumed to be the same as those derived from Mr Park's 2013 data.

The 55 dB Ldn contours

[130] Noise contours are produced using software referred to as an Integrated Noise Model ("INM"). The acoustic experts agreed[212] this software was appropriate to predict future noise levels at Omaka airfield and that the model aircraft types and settings that have been developed by Mr Hegley and Marshall Day Acoustics and confirmed by Dr Trevathan's measurements to be appropriate. The software requires at a minimum the input of runway locations, aircraft types and numbers of flights and flight tracks. There is disagreement over the helicopter flight tracks that should be modelled.

[131] Helicopters taking off towards and landing from the north currently track over the site[213]. Mr Hegley has used these tracks in his INM modelling. Mr Park believes these tracks create unnecessary disturbance over the site and to adjacent residential areas[214]. He thus proposed "helicopter noise abatement flight paths". On takeoff to the north a helicopter would veer slightly right and as it crossed New Renwick Road it would turn left and follow the Taylor River. Approaches from the north would come along the river and turn right to reach the eastern edge of the airfield[215]. Such noise abatement paths, according to Mr Park, are in common use at other aerodromes in New Zealand and are in accord with both the Aviation Industry Association of New Zealand's code of practice for noise abatement and Helicopter Association International guidelines[216].

[132] Mr M Hunt, an acoustics expert for the council, found the use of selected flight paths to reduce noise on the ground to be highly unusual but not unheard of. He was also concerned over the practicality of the paths suggested by Mr Park and how they could be imposed and enforced[217]. Mr Day, acoustic consultant to the Omaka Group, also found the approach unusual in that it moved flight paths so as to push the noise over existing residences to avoid noise on a future residential development[218]. This criticism was echoed by Mr Dodson, Managing Director of Marlborough Helicopters and holder of a Commercial Helicopter Pilot Licence. He described the noise abatement tracks as "clearly an inferior option from a noise abatement perspective and arguably is a less safe option"[219].

[133] Opinion as to the efficacy of the abatement paths was clearly divided. One reason is that no evaluation of the noise effects generated by flights along the abatement

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212 Joint Statement of Acoustic Experts dated 21 August 2013 Exhibit 14.1 para 5.
213 D S Park, evidence-in-chief Annexure 3 figures 5 and 6 [Environment Court document 13].
214 D S Park, evidence-in-chief para 6.9 [Environment Court document 13].
215 D S Park, evidence-in-chief Annexure 3 figure 8 [Environment Court document 13].
216 D S Park, evidence-in-chief paras 6.10–6.15 [Environment Court document 13].
217 M J Hunt, evidence-in-chief paras 55 and 58 [Environment Court document 26].
218 C W Day, evidence-in-chief para 3.6 [Environment Court document 23].
219 O J Dodson, evidence-in-chief para 21 [Environment Court document 30].

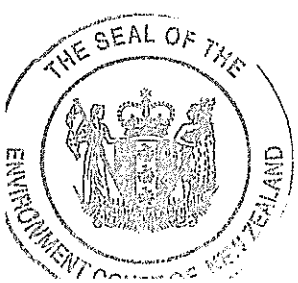
paths, and in particular on the residences along the river, has been carried out. The court has no power to introduce or enforce any flight paths and offers no view as to the appropriateness of the proposed paths at Omaka.

[134] The court received a number of 55 dB Ldn contours from the parties each derived under different assumptions. We list each contour received:

- Mr Hegley's 2028 contours: errors in the derivation of his first contour were corrected with a second contour being produced. Because both contours were for only 15 years in the future, they are disregarded.
- Mr Hegley's 2038 contour: this incorporates Mr Park's flight information for Runway 01 from one month of VHF recordings, annual growth rates of 2.7% and 10% for fixed wing aircraft and helicopter movements respectively, and uses the current flight paths from all runways. This contour crosses the site in an east/west direction with some 45% (9.6 ha)[220] of the site inside the contour.
- Dr Trevathan's 2028 contour: being only a 15 year projected contour this too is disregarded.
- Dr Trevathan's 2038 contours: all four contours are based on the three months (10 January – 8 April 2013) of recorded VHF data and a 2.7% growth rate for fixed wing aircraft movements. Two annual growth rates for helicopter movements, 6.6% and 7.7% (being 10% to 2028 and 4.4% for 2028 -2038), are used and for each there are contours with and without helicopter noise abatement paths.

[135] Dr Trevathan's contours all cross the site from east to west at varying distances from the southern boundary. The most intrusive contour is the 7.7% annual growth rate for helicopters with no abatement paths. It is at most 112.1 metres from the boundary[221] and encompasses 3.84 hectares. The least intrusive contour is the 6.6% annual growth rate for helicopters with abatement paths. This contour is not more than 42.9 metres from the boundary[222]. It encompasses 1.11 hectares.

[136] Dr Trevathan's contour assumed that helicopters would use "noise abatement flight paths" where helicopters alter course shortly after takeoff in order to reduce noise. At Omaka such a route would require a heading change of 10 degrees after takeoff from runway 01 to follow the Taylor River north and pass over an industrial area[223]. This flight path was used by Dr Trevathan in his modeling. It is a significant difference to Mr Hegley's modeling which used the current flight paths.



220 M J Hunt, evidence-in-chief para 62 [Environment Court document 26].
221 T P McGrail, Rebuttal evidence figure 7 [Environment Court document 9A].
222 T P McGrail, Rebuttal evidence figure 6 [Environment Court document 9A].
223 D S Park, evidence-in-chief para 6.20 [Environment Court document 13].

[137] The Omaka Aero Club has not implemented noise abatement paths for helicopters as an attempt to protect the amenity of its neighbours. Mr Dodson, of Marlborough Helicopters, states his company has a written policy to avoid overflying built areas whenever possible[224] but we received no indication that this policy is adopted by Omaka as an airport. Should the helicopter numbers increase at the suggested rate of 10% per annum there very likely will be reverse sensitivity effects arising from the helicopter tracks to the east which may force Omaka to adopt noise abatement paths (as suggested by Mr Park). Such paths operate at other New Zealand airports including Ardmore. Mr Park believes such paths should be developed for Omaka[225] in accordance with the Helicopter Association International guidelines and the Aviation Industry Association of New Zealand Code of Practice. The former includes a guideline[226] for daily helicopter operations which reads "Avoid noise sensitive areas altogether, when possible ... Follow unpopulated routes such as waterways".

[138] We see this as a possible way to protect residents' amenity and still let Omaka grow some of its operations as predicted out to 2038. There are differences of opinion[227] regarding the practicality and efficacy of the proposed tracks which we acknowledge. Further, as suggested by witnesses for the Omaka Group, those flight tracks might impose more noise on residents east of the Taylor River. We cannot ascertain from the noise contours (see the next paragraph) whether or not that is likely to be the case. Despite that we accept this approach in principle and thus regard Dr Trevathan's 2038 contour[228] as the best indication of the likely (but still inaccurate) location of the 55 dB Ldn contour in the vicinity of the site in 2038.

[139] The 55 dB Ldn contour was also plotted by Mr McGrail as a complete contour surrounding the aerodrome[229]. It encloses 349 existing residential properties east of the Taylor River. To obtain this contour Dr Trevathan assumed movements on runways other than 01 to be those recorded in a Hegley Acoustic Consultants' report which he attached to his evidence as Attachment 6. In the light of Mr Park's 2013 recording, Dr Trevathan was not confident about the correctness of these movements and thus believed the contour at places away from the site was incorrect[230]. He gave no indication of the magnitude or location of discrepancies from a "correct" contour.

Findings

[140] The 2013 55 dB Ldn noise contour produced by Dr Trevathan and not challenged by any witness will expand as airport activity increases. The court accepts Mr Day's view that the contour will reach the residential area east of the Taylor River

224 O J Dodson, evidence-in-chief para 17 [Environment Court document 30].
225 D S Park, evidence-in-chief para 6.16 [Environment Court document 13].
226 D S Park, evidence-in-chief para 6.15 [Environment Court document 13].
227 D S Park, evidence-in-chief para 6.2 [Environment Court document 13] and O S Dodson, evidence-in-chief para 21 {Environment Court document 30].
228 J W Trevathan, evidence-in-chief Attachment 9 [Environment Court document 14].
229 T P McGrail, Rebuttal evidence figure 4 [Environment Court document 9A].
230 J W Trevathan, evidence-in-chief para 6.2 [Environment Court document 14].

before it reaches the site[231]. It is the general view of the acoustic witnesses, and the court concurs, that there has not been sufficient work done to enable the location of a 55 dB Ldn noise contour for 2038 either near the site or for the airport as a whole. Not only is there insufficient information, but in any event there is considerable uncertainty as to the likely character of future use of the Omaka airfield.

[141] As a set the contours are sufficient to indicate to the court, the Omaka Group Aero Club and the council what may occur in the future. They will be a useful guide when formulating noise abatement procedures by way of a Noise Management Plan and possible protection within the District Plan.

Noise mitigation measures

[142] In addition to the use of abatement paths, Dr Trevathan provided a number of other suggestions for mitigating noise effects on the Colonial land[232]:

(i) aviation themed subdivision;
(ii) covenants;
(iii) situating houses so that outdoor areas are to the north;
(iv) reducing dwelling density on the southern boundary;
(v) mechanical ventilation;
(vi) acoustic insulation.

[143] Dr Trevathan suggested that the development could have an aviation theme[233], so that only people who liked airfield noise would choose to live there. As counsel for Omaka pointed out, this relies on people correctly identifying themselves as not being noise sensitive. Further, as the noise level is predicted to increase over time it is difficult to assess whether people will be able to cope with the noise in the future.

[144] The effectiveness of "no-complaints" covenants was discussed by Mr P Radich, an experienced lawyer in Marlborough, who gave evidence for Carlton Corlett Trust. While he accepted covenants are legally enforceable[234], Mr Radich was cautious about their effectiveness since they really just signal a problem rather than providing an effective solution[235]. He said that enforcement was dependent on how reasonable the covenanter thought it and whether they were the original covenanter[236]. Further, it is not council practice to enforce private covenants as such disputes are viewed as a private matter for the parties to determine themselves[237].

231 Transcript pp 514-515.
232 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
233 J W Trevathan, evidence-in-chief para 10.11 [Environment Court document 14].
234 *South Pacific Tyres Ltd v Powerland (NZ) Ltd* [2009] NZRMA 58 (HC).
235 Transcript at 748 line 17.
236 Transcript at 749 line 7.
237 Transcript at 750 line 14.

[145] It was suggested each house on the CVL site could be situated to the south of its allotment so that the outdoor areas were further away, although Dr Trevathan acknowledged this would not protect residents from the noise of planes flying overhead[238].

[146] With regard to acoustic ventilation, Dr Trevathan accepted that if all houses on the Colonial land were outside the OCB any additional insulation would be unnecessary[239]. As for mechanical ventilation, this allows people to keep windows closed reducing internal noise levels. However, since the internal noise level is already satisfactory with open windows at the level of external noise likely to be experienced on the Colonial land (depending on where the future airnoise boundary is) mechanical ventilation is not needed[240].

[147] In our view the only mitigation which is desirable is the registration of "no-complaints" covenants. The other measures would simply add costs without gaining commensurate benefits. We have considered whether even the proposed covenants will give sufficient benefits to outweigh the transaction costs of imposing them. Counter-considerations are that, as we find elsewhere, residents east of the Taylor River are likely to be affected by noise from aircraft taking off and landing at Omaka airfield before residents on the site — yet, so far as we know, there are no covenants imposed on the Taylor River residents. Further, there are likely to be other limitations on helicopter numbers operating from Omaka (e.g. conflict with Woodbourne operations).

[148] Over-riding those concerns is that airports — even those with very small numbers of aircraft using them — are potentially subject to "noise" complaints. Such complaints may have a critical mass beyond which the legality (or existing use rights) can potentially become irrelevant in the face of political pressure. Further, there is a suggestion by the High Court that councils are responsible for ensuring that nuisance issues do not arise through activities it allows: *Ports of Auckland Limited v Auckland City Council*[241].

[149] Since CVL is volunteering the covenants, we consider they should be accepted.

5. Does PC59 give effect to the RPS and implement WARMP's objectives?

5.1 Giving effect to the RPS

[150] We judge that PC59 would give effect to the Regional Policy Statement. It would enhance the quality of life[242] by supplying houses while not causing adverse effects on the environment, and it would appropriately locate a type of activity

238 Transcript at 245 line 7.
239 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
240 Transcript at 246 line 21.
241 *Ports of Auckland Limited v Auckland City Council* [1999] 1 NZLR 600 at 612 (HC).
242 Regional objective 7.1.2.

(residential development) which would cluster[243] with housing to the north and east, reflect the local character and provide the use of the river banks and beyond that, the Wither Hills.

[151] The air transport policy in the RPS — which focuses on Woodbourne — would not be affected.

5.2 Implementing the objectives of the WARMP

[152] The question for the court in this proceeding is whether the rezoning of a 21.4 hectare vineyard on the southern side of the Wairau Plains near Blenheim for 'residential' development, given its proximity to Omaka airfield, would promote the objectives and policies of the WARMP and the sustainable management of the district's natural and physical resources.

[153] The most relevant policy — (11.2.2)1.5 — requires that any expansion of the urban area of Blenheim achieves specified outcomes. We consider these in turn. In relation to achieving a compact urban form we note that development of the CVL would add to an existing part of Blenheim. In some ways it would tidy the existing rather anomalous residential enclaves along New Renwick Road and Richardson Avenue, both adjacent to the site.

[154] No issues were raised in relation to integrity of the road network. The site is adjacent to three roads, and can be suitably developed.

[155] As for maintenance of rural character and amenity values, the rural character of the site will be reduced, but the site is already rather anomalous in that respect since it has residential development to the north and east, and the business activities of the Omaka airfield and the Heritage Museum to the south.

[156] Appropriate planning for service infrastructure is an important issue. A significant feature of the site is that all services are readily available at a reasonable cost. The section 42 report presented to the council hearing stated "The development of the site is not constrained by the development of services"[244].

[157] Infrastructure must also be provided within the site to each dwelling. The site is essentially flat with a fall of 4 to 5 metres from southwest to northeast. This will allow the sewer and stormwater services to be easily staged throughout the development of the site[245]. Planning for this will necessarily be part of the overall development plan for the site and will produce no difficulties.

243 Regional policy 7.1.10.
244 T P McGrail, evidence-in-chief para 13 [Environment Court document 9].
245 T P McGrail, evidence-in-chief para 11 [Environment Court document 9].

[158] The 2010 Strategy assessed the site, along with nine other locations, for the provision of water, sewer and stormwater services. It found that "Development in this area can be connected to existing networks without upgrades of infrastructure"[246]. We conclude appropriate planning has been done for service infrastructure to the site and thus no further planning is necessary in this regard.

[159] Perhaps the key service infrastructure issue in the case — and a central issue in the proceeding — is the extent to which residential development of the site might restrain future development of the Omaka airfield. We discuss that in our conclusions below.

[160] No issue was raised in relation to productive soils.

[161] The Rural Environments section (Chapter 12) of the WARMP recognises the importance of the airport zone(s) and the explanatory note states that noise buffers surrounding the airport are the most effective means of protecting the airport's operation[247]. The RPS also requires that buildings and locations identified as having significant historical heritage value are retained[248] and as we have found Omaka airport to be a heritage feature this is relevant in terms of its protection, especially with reference to section 6(f) of the Act. We consider the covenant suggested as a mitigating measure by CVL can assist in that regard so that the heritage operation — flights of old aircraft — can continue and grow (within reason).

[162] While the objectives and policies of the WARMP give some protection to Omaka there is a "balance"[249] to be achieved with activities that might be affected by them. In summary we consider PC59 meets more objectives and policies (especially the important ones) than not, and thus represents integrated management of the district's resources.

5.3 Considering Plan Changes 64 to 71

[163] We consider the Plan Changes 64-71 are only relevant to the extent they show that the council has other solutions to the problem of supplying land for further residential development and we considered them earlier. We reiterate that these plan changes are at such an early stage in their development we should give them minimal weight.

246 SMUGS 2010 Summary for Public Consultation, p 14.
247 Wairau/Awatere Resource Management Plan 12.7.2, explanatory note at pp 12-23.
248 RPS objective 7.3.2.
249 M J Foster, evidence-in-chief para 4.14 [Environment Court document 27].

6. Does PC59 achieve the purpose of the RMA?

[164] In *Hawthorn*[250], the future state of the environment was considered in a land use context. The Court of Appeal concluded that[251]:

> ... all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

The future state of the environment includes the environment as it might be modified by permitted activities and by resource consents that have been granted where it appears likely those consents will be implemented. It does not include the effects of resource consents that may be made in the future. CVL submitted that, in a plan appeal context, this must extend to the prospect of plan changes or even plan reviews with entirely uncertain outcomes at some indeterminate time in the future[252]. CVL accepts there is a requirement to consider the future environment and has endeavoured to do so in its evidence using a predicted level of activity and effects associated with it. However, while the projections to 2038 will influence the resolution of the plan, CVL says the plan must also reflect other influences over those 25 years[253].

[165] Counsel for the Omaka Group submitted we should distinguish *Hawthorn* as concerning a resource consent application rather than a plan change. If the proposed airnoise boundary is to be taken into account as part of the environment the Omaka Group suggested that great care needs to be taken in assuming that airnoise and (outer control) boundaries will protect the community from noise and reverse sensitivity effects when there is currently no plan change proposed[254]. CVL argued that Omaka misses the point — section 5 applies to all functions under the RMA[255].

[166] The council submitted that, given the timing of PC59, before restrictions or protection are put in place for Omaka through a future plan change process, the planning environment as it is today is the appropriate reference. Mr Quinn submitted that the policy and planning framework of the WARMP:

- affords the district's airports, including Omaka, a high level of protection relative to land use aspirations around the airport;
- provides that an outer control boundary should be created for Omaka and specifically cites NZS 6805 and states that any 55 dBA Ldn noise contour must be surveyed in accordance with it; and

250 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299
251 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 at [57]
252 Closing submissions for CVL, dated 21 October 2013 at [48].
253 Closing submissions for CVL, dated 21 October 2013 at [55].
254 Closing submissions for Omaka, dated 11 October 2013 at [11].
255 Closing submissions for CVL, dated 21 October 2013 at [54].

- allows expansion of the Omaka aerodrome as a permitted activity.

6.1 Sections 6 and 7 RMA

[167] Section 6 of the Act concerns matters of national importance. Only one paragraph in section 6 is relevant. Section 6(f) provides for the protection of historic heritage from inappropriate subdivision, use, and development and is relevant for two reasons. First, the three grass runways are claimed to be the longest surviving set in New Zealand. They were prepared in 1928 and have been used ever since. Secondly, there is the world-class collection of World War I aircraft and replicas, superbly displayed with other thematic memorabilia, at the Aviation Heritage Centre.

[168] We accept it is a matter of national importance to protect those heritage values, and to allow their responsible expansion. There was no evidence that residential activities on the site will cause reverse sensitivity effects on the Omaka airfield in the near future. The evidence did establish that a business as usual approach for the Omaka airfield as a whole might cause issues for residents of the CVL site and thus potential reverse sensitive effects (complaints) by 2039. But not all activities at the Omaka airfield have heritage value. In particular there are helicopter and other general aviation activities whose expansion will need to be carefully examined by the council as it makes its decision about an outer control boundary for the airfield. Given those circumstances, we hold that the heritage values of the airfield need not be affected by the plan change and so give this factor minimal weight in the overall weighing exercise.

[169] Section 7 of the Act sets out other matters the court is to have particular regard to when making its decision. Section 7(b) of the Act concerns the efficient use and development of natural and physical resources and we will consider it in the context of the section 32 analysis. Section 7(c) provides for the maintenance and enhancement of amenity values and section 7(f) is also relevant since it talks about maintenance and enhancement of the quality of the environment. Both these matters are covered by and subsumed in the objectives and policies in the district plan.

[170] Counsel for the Omaka Group suggested[256] that section 7(g) of the RMA could be relevant but there was no specific evidence about that. There are extensive grass flats on the Wairau Plains so we consider that that argument cannot get off the ground.

6.2 Section 5(2) RMA

[171] The ultimate purpose of any proposed plan or plan change under the RMA is to achieve the purpose of the RMA as defined in section 5 of the Act. In the case of a plan change (depending on its breadth) that purpose is usually subsumed in the greater detail and breadth of the operative objectives and policies which are not sought to be changed. That is broadly the situation in this proceeding as we have discussed already.

256 Closing submissions for Omaka para 172.

[172] In terms of section 5 of the RMA the proceeding comes down to this: we must weigh enabling of a potential small community of residents on the site in the near future (in a situation where there is a relative undersupply of houses) against the potential longer-term (post 2038) disenabling expansion of activities on the Omaka airfield as the aviation cluster would like. We have found that the evidence, that growth in activities which would need to be restricted is unlikely, is more plausible than the evidence of greater growth (e.g. to 35 helicopters operating from the airfield by 2038). While we have recognised above the superb heritage value represented by the grass airstrips and the Aviation Heritage Centre, those can be protected into the future without causing reverse sensitivity effects if the site is rezoned under PC59.

[173] We also take into account that it is possible that some limitation on, in particular, helicopter movements at Omaka airfield may be necessary in the future. However, it will not necessarily be as the result of complaints from residents of the site. On the evidence it is more likely to be caused by complaints from occupiers of the council's subdivision east of Taylor River, or as a result of restrictions imposed by CAA, in order to safeguard operations at Woodbourne.

[174] In any event we have found that the objectives and policies of WARMP favour acceptance of the PC59 rather than its refusal. Our provisional view is that PC59 should be approved. However, there are some further considerations.

7. Result

7.1 Having regard to the MDC decision

[175] In accordance with section 290A of the Act the court must have regard to the decision which is the subject of the appeal.

[176] The Commissioners' Decision deals with the site in two parts. "Area A" is outside a notional outer control boundary ("OCB") and Area B is within the OCB. In respect of the area inside the contour — Area B — the Commissioners concluded[257]:

> 122. We consider that Area B should not be rezoned to accommodate new residential development. Sufficient reasons for that conclusion are:
>
> (a) The Standard directs that new residential activity should not be located in the OCB;
>
> (b) The reverse sensitivity effects on the Omaka Aerodrome from new residential development will be serious and potentially imperil the present and future operations of the Omaka Aerodrome not least by demand by residents to limit aviation related activities;
>
> (c) New residential development will not achieve the settled WARMP goals as expressed in the following provisions:
> (i) Section 11.2.1, Objective 1;
> Section 12.7.2, Objective 1. Section 11.2.2, Objective 2.

257 Commissioners' Decision para 122 [Environment Court document 1.2].

(ii) Section 22.3, Policy 1.1
Section 23.4.1, Policy 23.4.1 and Section 12.7.2, Policies 1.2 and 1.3.

(d) By reason of (a) – (c) above MDC is not assisted by PPC 59 in carrying out its functions under RMA s 31(1)(a) and PPC 59 does not achieve the overarching purpose of the RMA of sustainable management.

[177] In respect of mitigation they decided[258]:

(a) That full noise insulation (not just of bedrooms) was required;

(b) That insulation would have been inadequate mitigation because it did not allow for natural airflow from open windows which is an adverse amenity effect;

(c) Noise insulation within the building fabric does not address wider amenity concerns;

(d) We do not support the use of no complaint methods in this context as an adequate mitigation method to achieve the social wellbeing of the community which is a key component of sustainability.

[178] While Area A is outside of the OCB and therefore potentially suitable for residential development the Commissioners identified the following issues[259]:

124. The difficulties are:

(a) the total urban design concept presented by CVL is based on the whole site being developed for new residential use;

(b) there was no urban design assessment of the appropriateness of development on Area A alone;

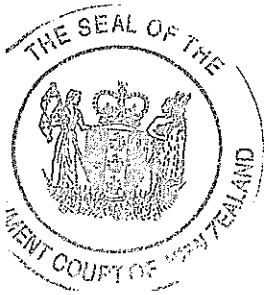
(c) there is no concept plan for Area A alone that can be used in order to ensure an appropriate planning outcome is achieved;

(d) it is unclear how the balance of the site (Area B) will be utilised in the long term. Conceivably it can be used for other purposes such as industrial development. An integrated solution will need to be carefully thought through and more detailed analysis undertaken.

[179] On balance the Commissioners considered that:

> ... the risk of approving new residential development on Area A by rezoning presents an unacceptable risk of poor strategic planning and lack of integrated development. A comprehensive strategic planning exercise is part of MDC's work stream and review of the WARMP and there is no pressing need for new residential land[260].

[180] The Commissioners' overall conclusion was that the application in its entirety should be declined[261].



258 Commissioners' Decision para 120 [Environment Commissioner document 1.2].
259 Commissioners' Decision para 124 [Environment Commissioner document 1.2].
260 Commissioners' Decision para 125 [Environment Commissioner document 1.2].
261 Commissioners' Decision para 126 [Environment Commissioner document 1.2].

7.2 Should the result be different from the council's decision?

[181] First, we have found the plan change meets more objectives and policies of the WARMP than not. This finding is in contrast to the Commissioners who found the goals of the WARMP would not be achieved.

[182] There was repeated reference in the evidence of the council's witnesses to PC59 not representing integrated management. That evidence reiterated the findings of the Commissioners' decision quoted above. We have taken special care to identify and consider the relevant objectives and policies of the district plan (the WARMP) and we find that PC59 is more likely than not to achieve most of the relevant objectives, and to do so in a generally integrated way.

[183] We also accept counsel for CVL's argument that the council is being inconsistent. Mr Davidson QC and Mr Hunt wrote[262]:

> If the Council is reliant on the notion that PC59 is a pre-emptive strike to a fully integrated process under the RMA then it [the Council] stands against the very process it utilised in Plan Changes 64 – 71. The importance of integrating Employment land use was not matched with any similar urgency or affirmative action.
>
> If Plan Changes 64 – 71 are thought to be fully integrated because they are incorporated as part of the final iteration of SMUGS then the same can be said of Colonial, which is expressly acknowledged to give effect to the Growth Strategy (with the only qualification that it be approved by the Environment Court).

[184] Second, the Commissioners' decision is predicated on the assumption that a (future) outer control boundary would cross the site dividing it into the two areas identified by the Commissioners as 'A' and 'B'. We do not consider that assumption is justified, because, as we have stated, the location of any future outer control boundary depends on a number of value judgements which we cannot (should not) make now.

[185] In fact, it was agreed by all parties that the noise contours provided to the Commissioners were for too short a time period and were erroneous. The 2038 timeline was agreed and the council accepted Mr Park's data as appropriate for projecting future noise levels. Dr Trevathan's 2038 contour with abatement paths is our preferred prediction although we accept it with due caution especially since we share Mr Park's scepticism that 30 helicopters will be using the Omaka airfield even by 2038.

[186] That analysis assumes that the Omaka airfield will continue to grow as it has in the recent past. However, as NZS 6805 recognises, there is a normative element to establishing where outer control boundaries should go. That exercise of judgement under the objectives and policies of the district plan and, ultimately, under section 5 of the RMA requires us to consider whether the Omaka airfield can, or should, develop at whatever pace supply (under the Aero Club's policies) and demand drive.

---

262 Final submissions for CVL paras 30 and 31 [Environment Court document 39].

[187] It seems probable (and appropriate) that some constraints in growth of the Omaka airfield — especially in helicopter numbers — will be appropriate due to two constraints independent of development of the site. These are the recent residential development east of the Taylor River, and the requirements of the Woodbourne airfield as it grows. Mr Day stated[263] that any 55 dB Ldn contour would expand on to the land east of the Taylor River well before it reaches the site.

[188] Third, the Commissioners were influenced by the need for "employment" land. While the obvious alternatives for the land are between the proposed Residential zoning and the existing Rural zone, we accept that the realistic alternatives for the site are residential versus some kind of "employment" use in the sense discussed earlier.

[189] We have found that industrial zoning of the site is likely to be an inefficient use of the resource. Nor would that inefficiency be sufficiently remedied by consideration of the Omaka airfield.

[190] It would (also) be inefficient to block residential development of the site because of perceived future reverse sensitivities of the Omaka airfield sometime after 2030. That is for two reasons: first, the best estimate of the 55 dB Ldn contour in 2038 depends on helicopter growth (30 helicopters operating out of the airfield) which we consider is unlikely; and secondly, there are more than likely to be other constraints[264] on such growth of Omaka airfield use in any event — for example complaints from residents of the new subdivision east of Taylor River, and operational demands of the Woodbourne airport as its operations increase in size and frequency.

7.3 Outcome

[191] Weighing all matters in the light of all the relevant objectives and policies, we conclude comfortably that the scales come down on the side of PC59 in general terms. We conclude that the purpose of the RMA and of the WARMP are better met by rezoning the site part as Urban Residential 1 and part as Urban Residential 2 as shown in the notified application subject to any adjustments for services as described by Mr Quickfall in his evidence.

[192] Two new objectives were proposed by CVL for the new section 23.6.1 of the WARMP. Those objectives are beyond jurisdiction as we discussed earlier. However, they are well-intentioned, and the second in particular seeking to introduce urban design principles — is potentially very useful. We consider they can be introduced as policies.

[193] We generally endorse the amendments to the policies and rules as stated in Mr Quickfall's Appendix 4 (subject to the *vires* deletions discussed at the beginning of this

263 Transcript pp 514-515.
264 Transcript p 160 lines 20-30.

decision) but we expect the parties to agree on the amended policies and rules in the light of these Reasons. For the avoidance of doubt we record that we regard the best practice urban design principles identified in Mr Quickfall's Appendix 4 as important and expect them to be written into PC59 (since no party opposed them) although we doubt whether they should be in "section 23.6" since that already exists in the WARMP. Since we have some doubts as to our jurisdiction under section 290, we will make an order under section 293 in respect of the urban design principles in order they may be introduced as policies, rather than as objectives. In case it assists we see these as implementing the urban growth objectives in the WARMP and thus tentatively suggest they should be located there.

For the court:

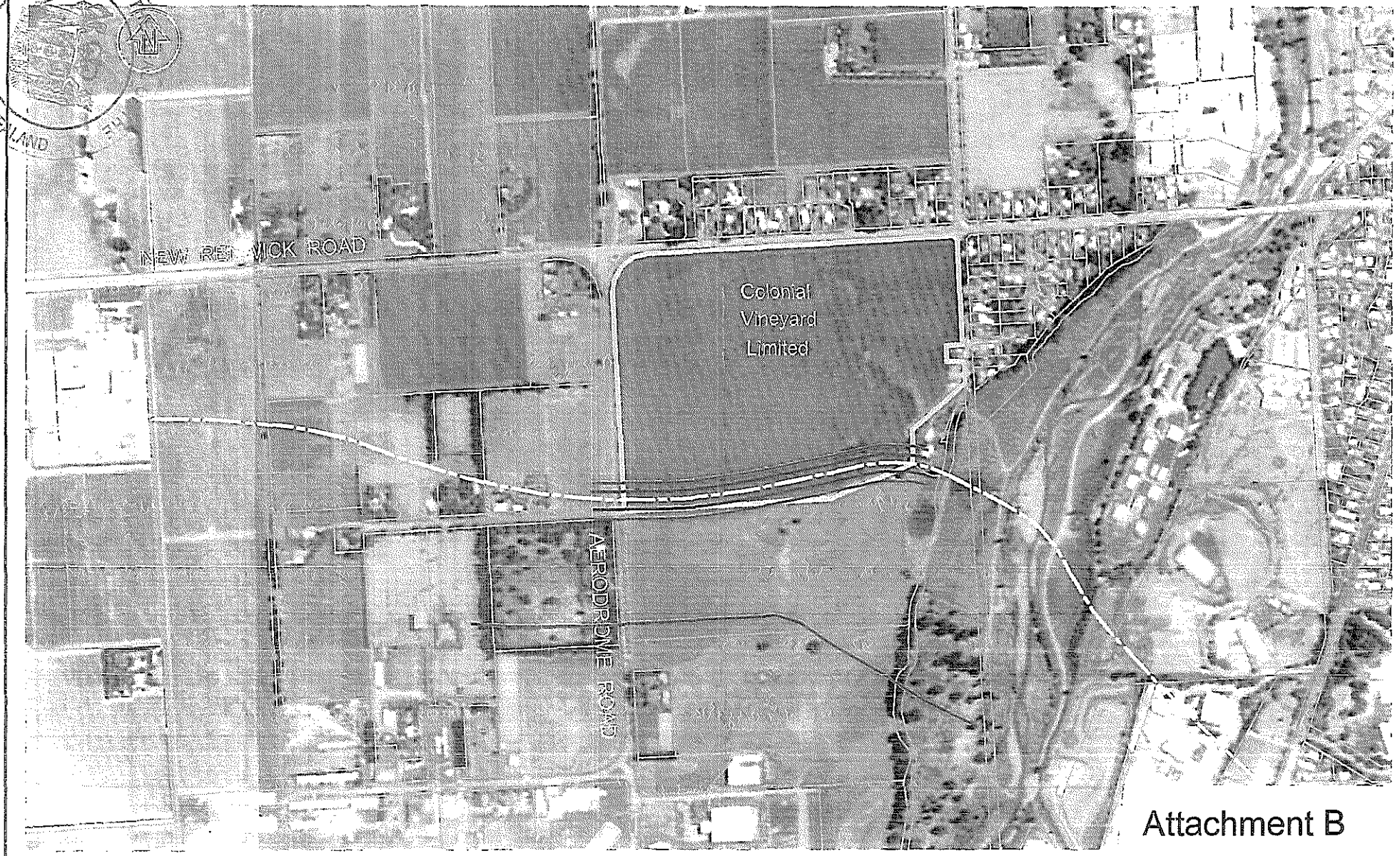
J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A J Sutherland
Environment Commissioner

Attachment 1: Site Map.

JacksojJud_Rule\d\Colonial Vineyards v Marlborough DC.doc



Attachment B

Ayson and Partners Ltd
REGISTERED PROFESSIONAL SURVEYORS
Davidson Ayson House
4 Nelson Street, P.O. Box 256
Blenheim, New Zealand
Ph 03 579 2099, Fax 03 578 7028
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Consultants in Surveying, Resource Management, Subdivision and Land Development

SUPPLEMENTARY EVIDENCE OF JEREMY TREVATHAN

2038 55dB Ldn Noise Exposure Contour. Based on updated flight movement data provided by Dave Park including helicopter abatement tracks

- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 5 %
- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 10 %
- Approximate 2013 55 dB Ldn contour

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DATE 09.09.2013	SHEET 25	ISSUE A
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ATTACHMENT 1

1586

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY AP No 42/02

IN THE MATTER of an appeal under section 299 of the Resource Management Act 1991

IN THE MATTER of an appeal from a decision of the Environment Court

BETWEEN **CARTER HOLT HARVEY LIMITED**

Appellant

AND **TE RUNANGA O TUWHARETOA KI KAWERAU**

First Respondent

AND **BAY OF PLENTY REGIONAL COUNCIL**

Second Respondent

Hearing: 25 October 2002

Counsel: Mr M A Muir for Appellant
No appearance by or on behalf of First Respondent
Mr P H Cooney for Second Respondent

Judgment: 12 December 2002

JUDGMENT OF HEATH J

Solicitors:
Clendon Feeney, PO Box 1305, Auckland
Cooney Lees & Morgan, PO Box 143, Tauranga
Counsel:
Mr M A Muir, P O Box 4234, Shortland Street, Auckland

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Introduction

[1] This is an appeal from an interim judgment of the Environment Court delivered on 15 February 2002. The central issue concerns the ability of a consent authority (or the Environment Court on appeal) to impose conditions on the granting of a resource consent. A subsidiary, but no less important, question is whether it was necessary for the Environment Court to give notice to the parties prior to issuing its decision so that the parties could be heard on conditions formulated by the Court during the course of its deliberations. That question raises a natural justice point.

[2] Te Runanga O Tuwharetoa Ki Kawerau was a party to the appeal in the Environment Court. It has been served with the appeal proceedings in this Court, but has elected to take no steps. For convenience, I refer to Te Runanga O Tuwharetoa Ki Kawerau as Tuwharetoa. Where appropriate, I differentiate between Te Runanga and the Ngati Tuwharetoa iwi.

[3] I express my gratitude to Mr Cooney, who, while appearing for the Bay of Plenty Regional Council [the Council] to abide the decision of the Court on the appeal, made a number of submissions based on his own substantial experience and expertise in this area of law, in a role akin to *amicus curiae.* Without the benefit of contrary argument from Mr Cooney on those issues I may not have been able to determine the points raised on appeal without appointing *amicus*.

Background

[4] The appeal is brought pursuant to s 299 of the Resource Management Act 1991 [the Act]. Section 299(1) of the Act permits any party to proceedings before the Environment Court to appeal to this Court, on a point of law, against a decision of the Environment Court.

[5] Three points of law are identified in the helpful and comprehensive submissions filed by Mr Muir in support of the appeal:

[a] Whether, as a matter of law, it was open to the Environment Court to impose a condition for which none of the parties before that Court had contended. This issue was said to raise the question whether the Environment Court was entitled, as a matter of law, to grant a resource consent for a particular term only if another party did not agree voluntarily to the term imposed by the Court.

[b] Whether the Environment Court erred in law by linking additional conditions imposed by it to a lesser term of consent in circumstances in which those conditions were irrelevant to the performance of the particular proposed waste water system with which the Court was dealing.

[c] Whether it was necessary for the Environment Court to alert the parties to the proposed additional conditions which it had formulated so that counsel could make submissions on those proposed conditions before a final decision was given by the Environment Court. This is the natural justice point.

[6] On reflection, it seems to me that the issues raised by Mr Muir can properly be narrowed to two, namely:

[a] Whether, as a matter of law, the Environment Court erred in imposing the conditions which it did – either through lack of jurisdiction or an inappropriate exercise of discretion; and

[b] Whether the Environment Court erred in law in failing to give the parties an opportunity to make submissions on additional conditions, not debated at the hearing before the Court, before the Court determined to impose those conditions.

[7] I deal with the issues raised in the following sequence:

[a] First, I refer to relevant background facts and to the terms of the decision from which the appeal is brought.

[b] Second, I consider the issues of te ao Maori which fall to be considered in the context of the provisions of the Act.

[c] Third, I consider the two points of law identified by me in para [6] above.

[d] Fourth, I express my conclusions on the issues raised and set out the formal orders of the Court.

Background Facts

[8] Carter Holt Harvey Limited [CHH] operates a pulp and paper manufacturing plant at Kawerau. Among the products produced at that manufacturing plant are bleached sulphonated chemi-thermo mechanical wood pulp and a range of industrial and domestic tissue papers.

[9] Since late 1987, CHH has discharged waste water into infiltration basins near the plant which are situated on the opposite side of the Tarawera River. CHH also discharges treated waste water into the river under a separate resource consent. The conditions relevant to that particular consent require the eventual diversion from the river, of effluent, containing sewage, for treatment on land.

[10] CHH is hopeful that, soon, it will be able to discharge waste water by means of irrigation over forest areas controlled by it. That particular strategy is central to CHH's goal of eliminating direct discharges of waste water into the Tarawera River.

[11] Tuwharetoa, representing the people of Ngati Tuwharetoa, supports CHH's proposed strategy in principle. Nevertheless, there are practical issues which must be addressed before the strategy can be made operational. CHH wishes to enter into a Memorandum of Understanding which would incorporate a formal endorsement by Tuwharetoa of its proposals, at an operational level.

[12] CHH sought a resource consent to discharge waste water from the mill and to dispose of treated effluent. It sought that consent for a term of 35 years which is the maximum permitted by the Act. After a hearing, the Council granted a 15 year term for the consent.

[13] CHH appealed against the Council's decision. After a mediation process undertaken in November 2001, agreement was reached with all but Tuwharetoa on a 21 year term for the resource consent. In evidence before the Environment Court the Council's Consents and Compliance Manager deposed that a 21 year term was warranted having regard to the fact that CHH has been discharging effluent into infiltration basins for the past 14 years with minimal effects on the quality of the water in the river. The agreement reached at the mediation on 5 November 2001 was recorded in a document headed "Heads of Agreement" signed at Whakatane after the mediation. The signatories to the agreement were CHH, Tuwharetoa, the Council and the Mediator.

[14] The Heads of Agreement records six propositions in the following terms:

1. That unless there are exceptional circumstances there will be no discharge of sewage to the Tarawera River.

2. That CHH will give priority to the disposal of effluent to forestry irrigation on their own land.

3. CHH agrees that no basins will be built across the ancestral pathway. The location of the excluded area will be agreed to by representatives of CHH and Tuwharetoa Ki Kawerau.

4. CHH will enter into a Memorandum of Understanding with Tuwharetoa Ki Kawerau to develop a relationship on environmental matters.

5. The Regional Plan for the Tarawera River catchment will be amended as generally provided for in the attached schedule and consent number 4202 condition 5.5 is amended by adding the following words: "Unless and limited in time to the period the consent holder is not able to spray irrigate to land, and the infiltration basins are not available."

6. Condition 13.1 of [the relevant consent] is to be amended by inclusion of reference to condition 12.1 in [that] condition.

[15] The conditions for discharge were incorporated in a document attached to the Heads of Agreement which record, in some detail, the way in which the waste would be discharged. Provision was made for regular reporting. Reports are required to be made every five years by CCH to the Council. Clause 12 of the Conditions attached to the Heads of Agreement provides:

> **12 EFFICIENCY OF INFILTRATION BASIN TREATMENT**
>
> 12.1 The consent holder shall in July 1999 and five yearly intervals thereafter, submit a report to the Regional Council summarising the effectiveness of the infiltration basis system in removing BOD_5 and microbiological contamination from the applied wastewater.
>
> This report shall quantify from groundwater flow calculations and bore monitoring data the mass loading of BOD_5 to the Tarawera River due to the exercise of this consent.
>
> 12.2 If the BOD_5 trigger level in bore E10 is exceeded in four or more consecutive measurements, as determined by the monitoring in condition 9.2, the consent holder shall prepare a report on only the BOD_5 as specified in condition 12.1.
>
> 12.3 This report shall be submitted to the Regional Council within three months of the fourth trigger level exceedence measurement occurring as specified in condition 12.2.
>
> 12.4 The BOD_5 trigger level referred to in condition 12.2 shall be calculated as:
>
> $$C_{BT} = \frac{500{,}000 \text{ G BOD}}{1.25\ Q_B}$$
>
> Where C_{BT} = 4 weekly average BOD_5 concentration in Trigger bore (g/m^3) QB = 90 day averaged Basin flow ((m^3d)
>
> 12.5 The consent holder shall provide a report to the Bay of Plenty Regional Council by July 2002 and by 1 July 2005, on the performance of the infiltration basins with respect to the removal of colour, toxicity, resin acids and fatty acids.

[16] CHH submitted that a 21 year term was justifiable having regard to the provisions of the Act and the principles established in various cases cited to the Environment Court. The Environment Court recorded, in its judgment, that

technical evidence put forward by CHH was "effectively unchallenged". At para [20] Judge Bollard, delivering the judgment of the Court, said:

> ..., having considered all that both witnesses had to say on soil and ground water aspects, effects on the river, effects of proposed extensions to the infiltration basins, colour and clarity of water discharged, resin and fatty acids, bacteria and viruses, and issues bearing on the river's ecology – we are satisfied that exercise of the consent, with the raft of controlling conditions proposed, will result in the Act's purpose being met, subject only to one reservation shortly to be mentioned. We so conclude, having also paid regard to the provisions of relevant planning instruments drawn to our attention, particularly the proposed Regional Plan for the Tarawera River catchment.

[17] On behalf of Tuwharetoa, Mr Whakaruru spoke of a close relationship with the river stretching over some 41 years. He also provided information to the Environment Court as to his understanding of the river's environs and resources as well as tribal history in relation to the river, which spanned many generations.

[18] In para [22] of its judgment the Environment Court recorded submissions made in opening by Mr Whakaruru as to the relationship of the Ngati Tuwharetoa iwi with the river as their taonga. The Court said:

> The relationship of the tangata whenua with the river was said to be central to the iwi's position of influence and identity. According to an environmental policy that the appellant has developed in relation to resource management issues, a consent by the Council involving the river (whether directly or indirectly) is generally regarded as unacceptable if the term exceeds 10 years, save in those cases where mitigation measures are specifically found by Tuwharetoa to be satisfactory. It was further contended that, as a matter of common sense, a long-term consent is unwarranted when the situation surrounding it is likely to change significantly over time.

[19] Evidence was also called from a member of the Ngati Tuwharetoa iwi, born and raised in Kawerau, who described Ngati Tuwharetoa's role of Kaitiaki in respect of the river. The loose English translation of the term "Kaitiaki" is that of a guardian. The term "Kaitiakitanga" is defined by s2(1) of the Act as follows:

> ... the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

[20] Ms Pacey expressed the view that long term discharge consents tend to alienate Maori from their taonga and impede, if not prevent, the ability of the iwi to perform its function as Kaitiaki. She confirmed what Mr Whakaruru had said about the importance of the river to Ngati Tuwharetoa at both a physical and metaphysical level. At para [24] of the judgment the Environment Court described those two aspects in the following way:

> ... - that is, physical in the sense of providing practical sustenance of water, fishing etc, and metaphysical in terms of the cultural and spiritual relationship of tangata whenua with the river as a vibrant entity.

[21] It appears that the evidence from Mr Whakaruru and Ms Pacey persuaded the Environment Court to impose additional conditions on the resource consent. At paras [25] and [26] of the judgment the Court said:

> [25] We acknowledge the concerns of the appellant as outlined above, bearing in mind the Act's provisions concerning Maori values. *Were it not for the Maori dimension, we would be quite prepared, on the technical evidence presented, to uphold CHH's request for the 21-year term without further inquiry. While we agree with Mr Whakaruru's submission that circumstances at Kawerau will doubtless alter*, with CHH along with other industries seeking to maintain and enhance their positions as efficient operators in their respective manufacturing fields, *we are satisfied that the controlling provisions of the proposed consent, and the allowance for expansion of the infiltration basins, will ensure that, for the 21-year term proposed, the level of effect upon the river's water quality from the consent's exercise will be maintained at the minor level intended.*
>
> [26] *The reservation we have, however, is that the conditions as proposed make no provision on their face for informing tangata whenua interests during the consent term over matters arising periodically as that term proceeds.* There is provision that no part of the soakage surface of any infiltration basin may be sited:
>
> > Within an ancestral pathway exclusion area which shall be approved by the Regional Council in consultation with Carter Holt Harvey Tissue Limited and Te Runanga O Tuwharetoa ki Kawerau.
>
> - but otherwise the conditions contain no reference to tangata whenua. *Given the Act's provisions bearing on Maori values, (including the need to recognise and provide for relevant factors under s 6(e) as a matter of national importance, and have particular regard to s 7(a)), if the longer term is to be upheld, we consider that the conditions*

should be amended to provide that copies of reports to the Council in compliance with proposed conditions 12.1, 12.2. and 12.5 be furnished to appropriate tangata whenua interests, including the appellant; and further, that if the Council should serve notice on the consent holder under s 128(1)(a)(iii) of the Act in terms of proposed condition 13.2, it shall also notify relevant tangata whenua interests, including the appellant, of the step being taken. Again, *if the consent holder should formally seek to change or delete any condition of consent under s 127(1)(a), it shall first consult Tuwharetoa and other appropriate tangata whenua interests over its intention and accompanying reasons*. (my emphasis)

[22] The Court concluded by inviting counsel for CHH to file and serve a memorandum setting out amended conditions of consent to apply for the 21-year term in the light of the findings to which I have just referred. The Court indicated that it would give a final decision on receipt of such a memorandum.

[23] Instead of filing a Memorandum, CHH elected to appeal against the decision. CHH regards the approach taken by the Environment Court as raising important questions of principle with regard to the need for applicants for resource consents to consult, in the post determination phase of an application for a resource consent, with tangata whenua.

The Act and te ao Maori

[24] The structure of the Act, insofar as it refers to matters which fall within the rubric of te ao Maori can be summarised as follows:

[a] There is a specific direction to all persons exercising functions and powers under the Act, in relation to managing the use, development and protection of natural and physical resources, to take into account the principles of the Treaty of Waitangi: s8 of the Act.

[b] Among the matters of national importance which all persons exercising functions and powers under the Act, in relation to managing the use, development and protection of natural and physical resources, are required to take into account is the relationship of

Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga: s6(e) of the Act.

[c] All persons exercising functions and powers under the Act, in relation to managing the use, development and protection of natural and physical resources are required to have regard to both Kaitiakitanga and the ethic of stewardship: s7(a) and (aa) of the Act.

[25] The obligation, set out in s8 of the Act, to take into account the principles of the Treaty of Waitangi does not elevate that factor above other factors which those responsible for exercising functions and powers under the Act are required to consider. Indeed, the fact that the Act does not require persons exercising functions and powers under it to act in conformity with the principles of the Treaty has been criticised by the Waitangi Tribunal: *Ngawha Geothermal Resource Report* (Wai 304) at 147. The question whether the obligation of those responsible for exercising functions and powers under the Act to consider the principles of the Treaty should be elevated is, of course, a matter for Parliament, not for this Court. There is a consistent line of authority in the Environment Court which has emphasised the need for s8 to be read and understood in the context of the whole Act: eg *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193 at 214.

[26] The inter-relationship between the Act and the principles of the Treaty of Waitangi is discussed by the learned author of *Laws NZ, Treaty of Waitangi* at paras 73-75 (inclusive). That text carries the added authority of authorship by the current Deputy Chairperson of the Waitangi Tribunal and Chief Judge of the Maori Land Court, Chief Judge Williams. At para 73 the learned author provides the historical legislative context in which the operation and impact of the Act on Maori and Treaty issues fall to be considered. He states:

...

> Planning law first gave some recognition to Maori interests in 1977. The relationship of the Maori people and their culture and traditions with their ancestral land was included as a matter of national importance to be considered when administering the Town and Country Planning Act 1977. Although there is no specific reference to the Treaty of Waitangi in the 1977 legislation, resource

management decisions relating to the Treaty principles provision of the Resource Management Act 1991 still include reference to influential determinations relating to the Town and Country Planning regime's requirement of consideration of Maori relationships with land. The Treaty of Waitangi has been found to be relevant to the Maori people's relationships with the land by the Planning Tribunal, and such determinations continue to provide guidance under the present legislation. Nevertheless, it was clear that under the 1977 legislation the Treaty was not considered an overriding factor in the Planning Tribunal determinations. Although the Planning Tribunal had indicated that the Treaty would sometimes be a relevant consideration, the High Court expressed the view that it was not necessary to refer to the Treaty as intrinsic aid to the interpretation of the planning legislation.

Prior to 1991, water law had been regulated by a 1967 statute [the Water and Soil Conservation Act 1967]. The Town and Country Planning Appeal Board processed appeals of determinations relating to applications to take or discharge water. The Board developed a benefit/detriment test in order to determine applications. The 1967 legislation had no special protection of Maori interests or provision for Maori concerns. There were significant problems in fitting Maori spiritual concerns into the benefit/detriment test. Maori did give evidence as to spiritual concerns regarding the pollution and flow of water, and the Planning Tribunal has been willing to hear such evidence but not to take it into account when applying the benefit/detriment test. It was not until after the *Huakina* [[1987] 2 NZLR 188] decision that the Planning Tribunal accepted that Maori values should be taken into account.

Planning Tribunal decisions on mining also have relevance to the current resource management regime, particularly the place of the Treaty of Waitangi in that regime. The Planning Tribunal initially took the view that Treaty-based objections could be allayed by imposing conditions in the grant of a licence. The Planning Tribunal has, however, indicated that matters relating to the Treaty of Waitangi could legitimately have been considered under the Mining Act 1971. In dealing with an appeal from the Planning Tribunal made in 1989, the High Court found that the Planning Tribunal did not adequately balance the benefits to be gained from the knowledge of mineralisation as against the admitted detriment from the perspective of the tangata whenua as relate to the lands of the Maori interests. The High Court has further stated that the association and conjunction of the Mining Act 1971, and the Town and Country Planning Act 1977 considerations to which the Tribunal has to have regard, create a comprehensive statutory scheme under which Maori cultural values and the Treaty may fall for consideration. [footnotes omitted]

[27] There is no comprehensive or authoritative list of the principles of the Treaty of Waitangi available for decision-makers to consider. That point is also made in

Laws NZ, Treaty of Waitangi, para 75. A list of (so-called) "central principles", which have been extracted from decisions of the Waitangi Tribunal, are set out in *Laws NZ, Treaty of Waitangi*, para 12. I paraphrase those "principles" below:

[a] The Crown has an obligation to protect actively Maori interests. Kawanatanga is less than absolute sovereignty and carries with it protective obligations. See *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8) at 69 and 70.

[b] The Crown and Maori have mutual obligations to act reasonably and in good faith. Good faith consultation between parties is necessary to sustain the Treaty relationship: *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9) at 150. The Tribunal has taken the view that the Maori perception of the Treaty was that a working relationship would require an absolute trust in an honourable rejoinder: *Muriwhenua Land Report* (Wai 45) at 390.

[c] The Treaty provides a basis for a changing relationship and should always be progressively adapted. Like the Constitution of the United States of America, the Treaty has to be adapted to modern, rapidly changing circumstances: *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6) at 52.

[d] There is a principle of mutual benefit that should be applied. It is the Tribunal's view that neither partner can demand its own benefits if there is not also an adherence to reasonable state objectives of common benefit: *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) at 195.

[e] The Treaty has the basic object of two peoples living together in one country, and this concept lays the foundation for the principle of partnership: *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) at 193.

[f] The Crown has guaranteed rangatiratanga to all iwi, which includes an implicit guarantee that the Crown would not allow one iwi an unfair advantage over another: *Maori Development Corporation Report* (Wai 350) at 32. There can be seen a principle of fair process incorporating the concept that the government should be accountable for its actions in relation to Maori: *Muriwhenua Land Report* (Wai 45) at 390.

[g] The Crown has an obligation to recognise rangatiratanga. This may include a tribal right to manage resources in a manner compatible with Maori custom: *Ngaitahu Report* (Wai 27) Vol III at 824. This principle has been described as the principle of paramount importance. The Tribunal has suggested that it was an intrinsic principle of the Treaty that Maori would recognise and respect the Governor and the Governor's right to national governance, while the Governor would recognise and respect Maori and their rangatiratanga: *Muriwhenua Land Report* (Wai 45) at 390.

See also the discussion of the principles of the Treaty of Waitangi contained in the Law Commission's Study Paper, *Maori Custom and Values in New Zealand Law* (NZLC SP9, March 2001) at paras 334-351 (inclusive).

[28] In *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), Lord Woolf, delivering the advice of the Privy Council, said (at 517):

> Both the [Treaty of Waitangi Act 1975] and the [State Owned Enterprises Act 1986] refer to the "principles" of the Treaty. In Their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty.) With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.
>
> Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property,

> including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligation although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility

[29] The Law Commission, in para 352 *of Maori Custom and Values in New Zealand Law* referred also to a submission which it had made to the Health Select Committee on the New Zealand Public Heath and Disability Bill 2000 which urged Parliament, so far as possible, to provide the Courts with guidance as to its precise intention when referring to the "principles of the Treaty of Waitangi" in legislation. The Commission noted that those who are required to comply with a statute must be able to ascertain, with some degree of certainty, what it is that they must do, or omit, in order to comply. The undesirability of resolving such uncertainty by reference to a Court was, expressly, noted. I echo those observations.

[30] The nature of the duty to consult with Maori is summarised by the learned author of *Laws NZ, Treaty of Waitangi* at para 75 in the following terms:

...

> The duty to consult has been formulated as part of the obligation for Treaty partners to work in good faith in their dealings with each other. Therefore, the Crown has a duty, when acting within its sphere, to make an informed decision; that is, a decision which is sufficiently informed as to the relevant facts and law to be able to say that it has had proper regard to the impact of the principles of the Treaty. The Tribunal has also dealt with the issue of consultation under the Resource Management Act as a Treaty principle. Even though, in the facts of the claim before the Tribunal, the Crown has sought consultation with national Maori organisations, the Tribunal found that it had failed to perceive the nature and effect on local claimants of the legislation claimed against. In that instance, the Tribunal found that the Crown was not in a position to make a decision that was sufficiently informed as to the relevant facts and law to be able to say that it had had proper regard to the impact of the principles of the Treaty. [footnotes omitted]

[31] The duty to consult has its origins in the landmark decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA). That case focused on s9 of the State-Owned Enterprises Act 1986 which provided:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

I emphasise that the duty to consult arises out of the relationship of Treaty "partners" – it is not an obligation cast on individual or corporate citizens.

[32] I refer, in particular, to the discussion of the phrase "the principles of the Treaty of Waitangi" in the judgment of Cooke P in the *New Zealand Maori Council* case at 661-666. The learned President noted that the phrase "the principles of the Treaty of Waitangi" was beginning to come into common use in New Zealand statutes His Honour noted, in particular, s6 of the Treaty of Waitangi Act 1975, the Long Title of the Environment Act 1986 and s4 of the Conservation Act 1987. Cooke P also noted the terms of the recital to the Maori Affairs Bill then before Parliament which was subsequently enacted in Te Ture Whenua Maori Act 1993.

[33] As noted in the Law Commission's Study Paper, at para 352, there were, at the time the Commission made its submission on the New Zealand Public Health and

Disability Bill 2000, fourteen different enactments passed by Parliament which referred to the "principles of the Treaty of Waitangi". The statutes mentioned by the Commission (which omit statutes which give effect to Treaty settlements) are listed below:

- Treaty of Waitangi Act 1975, s.6(1)
- Environment Act 1986 (long title)
- State-Owned Enterprises Act 1986, s.9
- Conservation Act 1987, s.4
- Education Act 1989, s.181(6) (added 1990)
- Crown Minerals Act 1991, s.4
- Resource Management Act 1991, s.8
- Foreshore and Seabed Endowment Revesting Act 1991, s.3
- Harbour Boards Dry Land Endowment Revesting Act 1991, s.3
- Crown Research Institutes Act 1992, s.10
- Hazardous Substances and New Organisms Act 1996, s.8
- Crown Pastoral land Act 1998, ss25 and 84
- Energy Efficiency and Conservation Act 2000, s.6
- Hauraki Gulf Marine Park Act 2000, s.6

[34] Writing 14 years after the *Maori Council* case, in the context of the interface between Te Ture Whenua Maori Act 1993 and the Resource Management Act 1991, Lord Cooke of Thorndon, delivering the advice of the Privy Council in *McGuire v Hastings District Council* [2002] 2 NZLR 577, referred to the process for appointment of Judges of the Environment Court and Commissioners of that Court in developing the proposition that the Maori dimension and Maori interests were of particular importance in the context of the Act. At para [27] at 596 His Lordship said:

> Appointments as Environment Judges and Commissioners are made by the Governor-General on the recommendation of the Minister of

Justice, after consultation with the Minister for the Environment and the Minister of Maori Affairs. Section 253 states that the appointment of Commissioners is to ensure that the Court possesses a mix of knowledge and experience, including knowledge and experience in matters relating to the Treaty of Waitangi and kaupapa Maori. An alternate Environment Judge may act as an Environment Judge when the Principal Environment Judge (appointed under s 251), in consultation with the Chief District Court Judge or Chief Maori Land Court Judge, considers it necessary for the alternate Environment Judge to do so (s 252). A Deputy Environment Commissioner may act in place of an Environment Commissioner when the Principal Environment Judge considers it necessary (s 255). Section 269, dealing with the powers and procedure of the Court, includes an express direction that the Court shall recognise tikanga Maori where appropriate. These various provisions are further evidence of Parliament's mindfulness of the Maori dimension and Maori interests in the administration of the Act.

[35] It is against that general background that I consider the specific points raised by Mr Muir in support of the appeal.

The Imposition of Conditions

(a) The Source of Jurisdiction

[36] The jurisdiction of either a consent authority or, on appeal, the Environment Court, to impose conditions on the granting of a resource consent springs from s108 of the Act. Section 108(1)-(7) (inclusive) of the Act provide:

> 108 Conditions of resource consents
>
> (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).
>
> (2) A resource consent may include any one or more of the following conditions:
>
> (a) Subject to subsection (10), a condition requiring that a financial contribution be made:
>
> (b) A condition requiring that a bond be given in respect of the performance of any one or more conditions of the consent, including any condition relating to the alteration or the removal of structures on the expiry of the consent:

(c) A condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:

(d) In respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into, in favour of the consent authority, in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates):

(e) Subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:

(f) In respect of a subdivision consent, any condition described in section 220 (notwithstanding any limitation on the imposition of conditions provided for by section 105(1)(a) or (b)):

(g) In respect of any resource consent for reclamation granted by the relevant consent authority, a condition requiring an esplanade reserve or esplanade strip of any specified width to be set aside or created under Part 10:

(h) In respect of any coastal permit to occupy any part of the coastal marine area (relating to land of the Crown in the coastal marine area or land in the coastal marine area vested in the regional council), a condition—

(i) Detailing the extent of the exclusion of other persons:

(ii) Specifying any coastal occupation charge.

(3) A consent authority may include as a condition of a resource consent a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.

(4) Without limiting subsection (3), a condition made under that subsection may require the holder of the resource consent to do one or more of the following:

(a) To make and record measurements:

(b) To take and supply samples:

(c) To carry out analyses, surveys, investigations, inspections, or other specified tests:

(d) To carry out measurements, samples, analyses, surveys, investigations, inspections, or other specified tests in a specified manner:

(e) To provide information to the consent authority at a specified time or times:

(f) To provide information to the consent authority in a specified manner:

(g) To comply with the condition at the holder of the resource consent's expense.

(5) Any conditions of a kind referred to in subsection (3) that were made before the commencement of this subsection, and any action taken or decision made as a result of such a condition, are hereby declared to be, and to have always been, as valid as they would have been if subsections (3) and (4) had been included in this Act when the conditions were made, or the action was taken, or the decision was made.

(6) Any condition under subsection (2)(b) may, among other things,—

(a) Require that the bond be given before the consent may be exercised or at any other time:

(b) Require that section 109(1) apply to the bond except in the case of a land use consent or a subdivision consent:

(c) Provide that the holder of the resource consent remains liable under this Act for any breach of conditions of the consent which occur before the expiry of the consent and for any adverse effects on the environment which become apparent during or after the expiry of the consent:

(d) Require the holder of the resource consent to provide such security as the consent authority thinks fit for the performance of any condition of the bond:

(e) Without limiting paragraph (d), require the holder of the resource consent to provide a guarantor (acceptable to the consent authority) to bind itself to pay for the carrying out and completion of any condition in the event of any default of the holder or any occurrence of any adverse environmental effect requiring remedy:

(f) Provide that the bond may be varied or cancelled or renewed at any time by agreement between the holder and the consent authority.

(7) Any condition under subsection (2)(d) may, among other things, provide that the covenant may be varied or cancelled or

renewed at any time by agreement between the consent holder and the consent authority.

...

(b) Introductory Comments

[37] In Mr Muir's submission the purpose of the Act is to encourage consultation (without imposing a legal obligation to consult) in the *pre-determination stages* of an application for a resource consent. Such consultation is likely to enhance the prospects of sound decision making. Mr Muir submits that no good purpose would be served by requiring, as a condition of a resource consent, consultation in the post determination phase.

[38] Mr Cooney invited me to focus on the nature of the obligations imposed by the Environment Court in its decision. In his submission the obligation to send monitoring information to "appropriate" tangata whenua representatives is met by the simple act of placing an envelope containing the relevant information in the post. Mr Cooney noted that the Court was endeavouring to provide for and to recognise Maori interests in a manner consistent with ss5, 6, 7 and 8 of the Act. I note that, expressly, the Environment Court placed reliance on ss6(e) and 7(a) in imposing the conditions: see para [26] of the Environment Court's interim judgment.

[39] Mr Cooney referred me to the observations of Lord Cooke of Thorndon, in *McGuire v Hastings District Council*, where, at para [21], 593-594 where His Lordship said:

> Section 5(1) of the [the Act] declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. *The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues.* By s 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including "(e) The relationship of Maori and

> their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By s 7 particular regard is to be had to a list of environmental factors, beginning with "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]". By s 8 the principles of the Treaty of Waitangi are to be taken into account. *These are strong directions, to be borne in mind at every stage of the planning process.* The Treaty of Waitangi guaranteed Maori the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. Thus, for instance, Their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available. (my emphasis)

[40] Mr Cooney submitted that para [26] of the Environment Court judgment showed particular sensitivity to te ao Maori and to the need to keep relevant iwi informed where long-term resource consents may otherwise threaten the role of tangata whenua as Kaitiaka.

[41] As a matter of law, the question whether it was open to the Environment Court to impose a post-determination obligation of consultation as a condition of grant of the resource consent turns on whether one regards s108 of the Act as a general provision which authorises the imposition of conditions which do not expressly conflict with the specific terms of the section (as submitted by Mr Cooney) or as a section which, in a prescriptive way, sets out those conditions which can be imposed to the exclusion of all others (as Mr Muir submits). If Mr Muir is right on the interpretation issue, the conditions have been imposed without jurisdiction. If Mr Cooney is right the Court had jurisdiction to impose the conditions. If Mr Cooney is right the next question is whether, in the exercise of its discretion, it was appropriate for the Environment Court to impose the condition.

[42] The conditions with which CHH takes issue are:

[a] That copies of reports to the Council in compliance with proposed conditions 12.1, 12.2 and 12.5 be furnished to appropriate tangata whenua interests, including Tuwharetoa.

[b] That if CHH should seek formally to change or delete any condition of consent under s127(1)(a), it shall first consult with Tuwharetoa and other appropriate tangata whenua interests over its intention and accompanying reasons.

Both of these conditions are imposed by para [26] of the Environment Court judgment.

[43] Mr Muir puts forward four basic criticisms of the conditions in issue: one goes to jurisdiction while the remaining three go to discretionary issues. In summary form those criticisms are:

[a] First, that there is no jurisdiction, under s108 of the Act, to impose the conditions.

[b] Second, that the condition requiring reports to be forwarded to appropriate tangata whenua interests creates a regime of parallel reporting which is inconsistent with the terms of the Act and, in law, prohibited by s108 of the Act.

[c] Third, it is inappropriate for the Court to impose a legal obligation of consultation in the post-determination phase when, in fact, it is acknowledged that CHH, in accordance with recognised good practice, is in continuing consultation with Tuwharetoa about every aspect of its environmental management programme. The objection is the imposition of a legal obligation to consult when the status of legal obligation may bring with it endless arguments as to the adequacy of consultation.

[d] Fourth, that the requirement to consult with "appropriate tangata whenua interests", including Tuwharetoa is an ill-defined requirement as the tangata whenua interests to whom reports will need to be sent and with whom consultation will need to take place cannot be determined readily by CHH. The concern is that CHH might unwittingly find itself in default of an imposed condition through inability to define precisely the persons to whom information should be sent and the persons with whom it should consult.

(c) The Jurisdictional Point

[44] Mr Muir pointed out that s.108 of the Act, in its current form, was substantially revised by the Resource Management Amendment Act 1997. Further, Mr Muir notes that under s.108(2) of the Act as it stood prior to the 1997 amendments, conditions were not limited to those specified in the former s.108(1)(a-g).

[45] The new form of s.108 of the Act was considered by Paterson and Chambers JJ in *Auckland City Council v Retro Developments Ltd* (2002) 8 ELRNZ 157. That case concerned conditions requiring financial contributions. At paras [16] – [19], Chambers J, delivering the judgment of the Full Court, noted changes to s.108 which were relevant to financial contributions as follows:

> [16] In 1997, the Resource Management Act was amended by the Resource Amendment Act 1997. That Act, at least for present purposes, came into force on 17 December 1997. By s 75 of the Amendment Act, cl 3 in the Second Schedule, Part II, was repealed and a new clause substituted:
>
> > The circumstances when a financial contribution of money or land may be imposed, the manner in which the level of the contribution that may be imposed will be determined, and the general purposes for which the contribution may be used.
>
> [17] Section 108 was also amended. Subsection (1) was repealed. New subsections were substituted as follows:
>
> > (1) Except as expressly provided in this section ... , a resource consent may be granted on any condition that the

consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(2) A resource consent may include any one or more of the following conditions:

(a) Subject to subsection (10), a condition requiring that a financial contribution be made ...

[18] Subsection (9) was repealed. A new subs (9) provided a new and simplified definition of 'financial contribution'. A new subs (10) was added:

A consent authority must not include a condition in a resource consent requiring a financial contribution unless –

(a) The condition is imposed in accordance with the purposes specified in the plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and

(b) The level of contribution is determined in the manner described in the plan.

[19] The significant feature of the 1997 amendment is that it removed references to maximum amounts. What the plan was now required to specify was not the maximum amount of contribution or the formula by which the maximum amount was to be calculated but rather 'the manner in which the level of the contribution that may be imposed will be determined'. Parliament was obviously concerned to ensure that developers should be able to look at the plan to determine how financial contributions were to be calculated. Parliament was obviously concerned to bring to an end a process by which a maximum was fixed, whether by statute or plan, and developers then negotiated with council officers a figure below the maximum. The evidence in the present case revealed graphically how inconsistent the practices of the Auckland City Council were in applying a discretionary regime within a statutory maximum. We suspect that Auckland's practices were by no means unique in the country.

[46] Further, at para [27] Chambers J, for the Court, added:

...Generally speaking, the conditions that may be imposed are any 'that the consent authority considers appropriate': see s 108(1). Those wide words are subject to various common law tests of reasonableness, but we need not be concerned with those here. That is because the general power is subject to express statutory exception (see the opening words of subs (1)) and there is such an express relevant statutory exception here. A financial contribution condition,

> if it is to be imposed, must be in accordance with the purposes specified in the plan in the plan... .

[47] I do not accept Mr Muir's submission that the *Auckland City Council v Retro Developments Ltd* case removes the ability of a consent authority to impose conditions which are designed to promote certain features of the legislation. Applying what was said by Chambers J, in para [27] of *Auckland City Council v Retro Developments Ltd,* I conclude that the Environment Court was entitled to impose conditions aimed at addressing issues of te ao Maori provided those conditions were not implicitly forbidden as being contrary to the intent of conditions contained in s.108(2) and (3) of the Act.

The Parallel Reporting Point

[48] In the context of the "parallel reporting" point, the issue is whether a condition requiring the holder of a resource consent to supply to tangata whenua interests information relating to the exercise of the resource consent is implicitly forbidden by s.108(3) of the Act, by which a consent authority may include, as a condition of a resource consent, a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.

[49] The answer to that question, in my view, lies in the wording of s.108(1) of the Act. Unless expressly provided by s.108 a resource consent may be granted on "any condition that the consent authority considers appropriate, including any condition of a kind referred to in subs(2)." In my view s.108(1) was not intended to limit conditions which a consent authority considered appropriate to impose. The discretionary authority to include, as a condition of a resource consent, a requirement of reporting to a consent authority does not, in my view, prohibit the consent authority from imposing a parallel reporting requirement which can be justified, on a discretionary basis, as appropriate. The ability to require reporting to a Council cannot, logically, forbid the ability to impose a parallel obligation for monitoring purposes.

[50] I hold, therefore, that there was jurisdiction for the Environment Court, on appeal, to impose the condition of parallel reporting. I consider, separately, whether that condition was imposed appropriately as a matter of discretion.

The Consultation Point

[51] Mr Muir submits that there was no jurisdiction to impose the obligation of consultation prior to the making of any formal application to change or delete any condition of the consent. The Environment Court required, before any such application was made, consultation with Tuwharetoa and other appropriate tangata whenua interests over its intention and accompanying reasons: see para [26] of the interim judgment.

[52] The ability to apply to change or cancel any condition of consent springs from s.127(1) of the Act, which provides:

> **127 Change or cancellation of consent condition on application by consent holder**
>
> (1) The holder of a resource consent may apply to the consent authority for the change or cancellation of any condition of that consent (other than any condition as to the duration of the consent)—
>
> (a) At any time specified for that purpose in the consent; or
> (b) Whether or not the consent allows the holder to do so, at any time on the grounds that a change in circumstances has caused the condition to become inappropriate or unnecessary.

[53] Under s127(1)(a) of the Act the holder of a resource consent is *entitled* to apply for a change or cancellation of any condition of the consent (other than any condition as to the duration of the consent) at any time specified for that purpose in the consent. There is also a right to apply for a change or cancellation of any condition if circumstances have changed to cause the condition to become inappropriate or unnecessary: s127(1)(b) of the Act. The issue is whether there is jurisdiction to impose a condition of the grant of a consent that the consent holder must consult *before* making an application based on s.127(1)(a) of the Act.

[54] It is significant that the Environment Court has sought to limit the requirement of consultation to any application under s127(1)(a) of the Act which may only be made at a time specified in the resource consent. No attempt has been made to interfere with the right for the consent holder to apply for change or cancellation of any condition of the consent due to change of circumstances.

[55] Nevertheless, for three reasons, I am satisfied that neither a consent authority nor the Environment Court, on appeal, has jurisdiction to impose a condition requiring consultation with tangata whenua interests prior to the making of an application under s127(1)(a) of the Act. Those three reasons are:

[a] The consent authority, or the Environment Court on appeal, is only entitled to specify *a time* at which an application under s127(1)(a) of the Act can be made. That is consistent with the obligation of a consent authority to ensure that longer term resource consents are reviewed regularly to meet changing conditions. The imposition of a condition specifying a time at which an application under s127(1)(a) may be made permits the consent authority to determine, in advance, when a review should take place rather than being reactive to an application made due to circumstances which have already changed. The ability to specify a time does not need, to be effective, to go further and to require consultation with a particular group, whether tangata whenua interests or not, before the application is made. The imposition of such a condition is, in my view, an unnecessary fetter on the right to apply under s127(1)(a).

[b] Responsible holders of resource consents will, undoubtedly consult regularly with tangata whenua interests to ensure efficient despatch of such applications. While this is good practice, there are difficulties in elevating the obligation to consult to the status of a legal obligation for the reasons which Mr Muir advances: i.e. once it is elevated to a legal obligation disputes can arise as to whether the obligation to consult has been adequately discharged. Inevitably, such disputes will lead to preliminary points being taken at the hearing of

applications under s127. It is undesirable for the expeditious determination of applications under s127 to be undermined by the possibility of such preliminary issues arising.

[c] The nature of the obligation to consult with tangata whenua interests is an obligation which springs from s8 of the Act and the principles of the Treaty of Waitangi. The duty to consult is one which has been formulated as part of the obligation for Treaty partners to work in good faith in their dealings which each other. It would be wrong in principle to impose an obligation on individual or corporate citizens to consult with tangata whenua interests when there is no other obligation to do so.

[56] For those reasons I hold that there was no jurisdiction for the Environment Court to impose the condition requiring consultation with tangata whenua interests in relation to any application which may be made under s.127(1)(a) of the Act.

(c) The Parallel Reporting Point – Discretion

[57] Having found that there was jurisdiction to impose the parallel reporting requirement the next question is whether it was appropriate for such a condition to be imposed.

[58] I am satisfied that it would be consistent with ss6(e), 7(a) and (aa) and 8 of the Act to impose, as a condition of a long-term resource consent, an obligation to report to designated tangata whenua interests so that they can monitor developments without the need to travel to inspect Council records. For example, in this particular case, Tuwharetoa is based in Kawerau whereas the Council records are maintained at Whakatane. So long as the obligation imposed goes no further than forwarding the same information to designated tangata whenua interests as is required to be sent to the Council there can be no quarrel with the exercise of a discretion to impose such a condition. While the Environment Court relied, in particular, on ss6(e) and 7(a) to impose the condition of parallel reporting the principles of the Treaty to which I have

referred in para [27] above also support the condition. In particular, I refer to para [27] [a], [b], [d], [e] and [g] (above).

[59] The difficulty, in this particular case, is that the Environment Court refers to copies of reports being furnished "to appropriate tangata whenua interests, including Tuwharetoa." To whom should such reports be sent? There is no clear answer. Various iwi and hapu may have interests in respect of the river. In my view it is incumbent on the consent authority or the Environment Court, on appeal, to specify with particularity the persons to whom such reports must be sent if such conditions are to be imposed. Any condition involving parallel reporting, particularly in the context of te ao Maori, should take into account those tangata whenua interests who have sought to be heard, on the particular issue, before either the consent authority or the Environment Court.

[60] I see no objection to a condition requiring such reports to be sent to Tuwharetoa at the address for service which it has given to the consent authority or the Environment Court. But I do not think it is appropriate, as a matter of discretion, for an applicant for a resource consent to be required to make its own assessment of the "appropriate" interests to whom reports should be sent. It is both undesirable and wrong in principle for a party to be required to make its own assessment of what is necessary to comply with a condition imposed either by the consent authority or the Environment Court.

[61] I suspect that the Environment Court recognised this difficulty and intended to deal with it on receipt of memoranda from counsel after which it had indicated that a final decision would be given: see para [22] above. The uncertainties created could have been identified in such a memorandum. In order to achieve clarity it may have been preferable, with the benefit of hindsight for the Environment Court to have expressed its thinking in general terms and then invited submissions on the specific matters to be included in any conditions to be imposed.

The Natural Justice Point

[62] Mr Muir submitted that the Environment Court ought to have indicated the additional conditions which it was intending to impose and sought further submissions from the parties before determining whether they should be imposed. Mr Muir drew an analogy with observations made in the Privy Council in which their Lordships criticised the Court of Appeal for determining the meaning of the term "iwi" without providing the parties with an opportunity to call evidence and make submissions on that issue. In *Treaty Tribes Coalition, Te Runanga o Ngati Porou and Tainui Maori Trust Board v Urban Maori Authorities* [1997] 1 NZLR 513 (PC) at 522, Lord Goff of Chieveley, delivering the advice of the Privy Council, said:

> ...Their Lordships... accept that the question of the meaning of "iwi" was "on the table", as counsel for the Urban Maori Authorities put it. But she did not put it any higher than that; and Their Lordships accept the submission that the parties to this appeal before the Court of Appeal were never put on notice that the Court of Appeal intended to make a decision upon this point or indeed regarding the scope of the commission's statutory duties. Moreover in matters as important as these, it would in Their Lordships' opinion have been appropriate for the Court to formulate any fresh questions for decision by the Court. Had this been done, Their Lordships consider that the parties to the appeal, for whom the whole subject was a matter of deep concern, would have asked for a full opportunity to make submissions to the Court on such questions. As it was, they were deprived of that opportunity.

[63] The need for parties to be heard on such matters is reinforced by s.27(1) of the New Zealand Bill of Rights Act 1990 which provides:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[64] There is some force in Mr Muir's submissions. It is important that every party have an opportunity to make submissions on orders contemplated by any court,

tribunal or other public authority which has power to make determinations in respect of that party's rights, obligations or interests.

[65] In this particular case, it would have been preferable for the Environment Court to express its proposed conditions as provisional views and then to have sought memoranda, or submissions at an oral hearing, from counsel before making a final decision. I strongly suspect that the Environment Court contemplated that issues arising from its interim decision would, in fact, be debated prior to a final decision being made. In that regard I refer to my observations in para [61].

[66] The fact that I have found that there was no jurisdiction for the Environment Court to impose the obligation of consultation in respect of any application under s127(1)(a) of the Act demonstrates the importance of the need to hear from the parties in such circumstances.

[67] Although I am inclined to the view that the Environment Court ought to have given an opportunity to counsel to be heard on the proposed conditions I do not intend to grant relief on this aspect of the case having regard to my earlier conclusions.

Conclusions

[68] For the reasons I have given:

[a] I hold that there was jurisdiction to impose the obligation of parallel reporting to tangata whenua interests, particularly having regard to the role of Tuwharetoa as Kaitiaki of the river. However, I hold that as a matter of discretion it was inappropriate for the Environment Court to impose that condition in the form in which it did because it defined with insufficient particularity the "interests" to whom CHH must report. That placed CHH in an invidious position if it failed to report to a particular iwi or hapu to whom the Court considered it ought to have reported.

[b] I hold that the condition requiring consultation with tangata whenua in respect of any application under s.127(1)(a) of the Act was imposed without jurisdiction.

Result

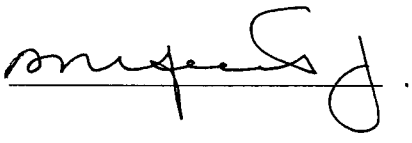
[69] The appeal is allowed. The imposition of a condition requiring parallel reporting is quashed. The issue of the imposition of a requirement of consultation with tangata whenua interests prior to any application under s127(1)(a) of the Act is also quashed. I remit to the Environment Court for rehearing the form of the condition to be imposed in respect of parallel reporting having regard to what I have said in this judgment. No doubt, the need for a parallel reporting condition and the precise form that condition may, if made, take will be reconsidered by the Environment Court after hearing from counsel, either in person or by memoranda.

[70] No relief is granted in respect of the natural justice point.

[71] It will be for the Environment Court to determine what procedure ought to be followed in respect of outstanding issues.

[72] I regard this case as a test case and therefore make no order as to costs.

[73] I thank both Mr Muir and Mr Cooney for their assistance at the hearing of the appeal.



P R Heath J

Signed at 12.50 ~~am~~/pm 12 December 2002

DOUBLE SIDED

ORIGINAL

Decision No. A143/97

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 121 of the Act

BETWEEN R M MASON-RISEBOROUGH

(Appeal RMA 57/97)

Appellant

AND MATAMATA-PIAKO DISTRICT COUNCIL

Respondent

AND TELECOM NEW ZEALAND LIMITED

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge Whiting (presiding)

Environment Commissioner Mr J R Dart

Environment Commissioner Mr R F Gapes

HEARING at HAMILTON on 29 and 30 September and 1 and 2 October 1997

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

COUNSEL

Ms J Allin and Ms S Quayle for applicant

Mr A M B Green for respondent

Mr C D Arcus for appellants Howitt & Caird

Ms Mason-Riseborough in person

Ms Turner for Hutana McCaskell, a s.274 party

DECISION

INTRODUCTION

This is an appeal against the granting of resource consent to the applicant to establish operate and maintain a cellular radio base station (cell site) on the lower slope of Mt Te Aroha. The description of the land affected is Lot 3 DPS 41317 Puriri Street, Te Aroha. The mast of the cell site will have a total height of not more than 24.4 metres. Ms McCaskill gave notice pursuant to section 274 claiming an interest on behalf of the tangata whenua in respect of Mt Te Aroha.

Various grounds opposing the Council's decision were raised by the appellants and Ms McCaskill. These include:-

- *The height and profile of the proposed structure will be a prominent and noticeable feature which will have a visually obtrusive effect.*
- *Mt Te Aroha constitutes an outstanding natural feature and landscape. The cell site is proposed to be on the lower slopes of Mt Te Aroha which are an integral part of that outstanding natural feature and landscape. Such a feature and landscape should be recognised and provided for by excluding from it the proposed cell site.*
- *The proposed structure and its activity will have an adverse effect on property valuations in the immediate vicinity.*
- *The cell site is not required in the locality for adequate functioning of Cellular Telecommunications.*
- *The proposed structure and its activity is contrary to the objectives and policies of the transitional district plan and/or the proposed district plan of the Matamata-Piako District Council.*
- *The adverse effects of the proposed structure and its activity are greater than minor.*

- *The proposed structure and its activity cannot satisfy the threshold test contained in section 105(2)(b) of the Resource Management Act 1991.*
- *The proposed structure and its activity does not:*
  - *(a) Constitute an efficient use and development of natural and physical resources.*
  - *(b) Maintain and enhance amenity values.*
  - *(c) Maintain and enhance the quality of the environment.*
- *Establishing a cell site in the locality proposed:*
  - *(a) Fails to recognise and provide for the relationship of Maori and their culture and tradition with their ancestral lands, water, sites, waahi tapu and other taonga.*
  - *(b) Does not have particular regard to kaitiakitanga.*
  - *(c) Fails to take into account the principles of the Treaty of Waitangi.*

It was common ground that the potential effects of cell site microwave radiation were not at issue in this case.

PLANNING INSTRUMENTS

It was accepted by all parties to this appeal that the relevant planning instruments are:

- *the proposed Waikato Regional Council Regional Policy Statement ("regional policy statement")*
- *the first review of the Te Aroha Borough District Scheme 1977 ("transitional district plan")*
- *the proposed Matamata-Piako Council District Plan ("proposed district plan")*

Regional Policy Statement

The regional policy statement has reached the stage where submissions and cross-submissions have been filed, hearings have been conducted and decisions delivered. References have been filed and are almost entirely dealt with. In our view there are three policies from the regional policy statement that have relevance for this appeal. These are:-

- ***2.1.5 Maori Culture and Tradition - Policy 1***

  Ensure that the relationship tangata whenua have with their ancestral land, water, waahi tapu sites and other taonga is recognised and provided for in resource management decision making.

- ***3.1.5.2 The Region's Heritage***

Policy 1 Protection of Heritage Resources

Ensure the protection of significant, natural and cultural heritage resources.

The first implementation method is:

Through district plans and resource consents identify and provide for the protection of significant natural and cultural heritage resources including the protection of views and site lines of important natural features and landscapes.

- ***3.1.5.3 Maori Heritage***

Policy 1: Protection of Maori Heritage

Seek to avoid accidental or incidental damage or interference to heritage resources of significance to Maori.

Transitional District Plan

The site upon which it is proposed to erect the mast, antennae and equipment shed is located in the Rural Agricultural Zone. The proposed access track (Lots 1 and 2) is located in a Residential Zone. The Rural Agricultural Zone provides for uses in areas of land which are never likely to be used for any urban purposes even beyond the planning period. The objectives and the rules of this zone are clearly designed to retain the open and visually aesthetic character of the zone.

The scheme statement for the rural agricultural zone (paragraph 27) says:-

"27. *Rural-Agricultural Zone*

This zone is similar to the adjoining "Special Rural" zone of the Piako County Council's District Scheme. The uses permitted are agricultural uses and forestry which will preserve the visually aesthetic character and open spaces of the area. Generally this zone covers land unlikely ever to be used for urban purposes and includes mountain slopes; or is subject to flooding or not desirable urban land. Some of the area is in productive farming use. Dwellinghouses related to the rural use are permitted.

Bulk and location and subdivisional requirements will ensure that the open character of the area is preserved".

The zone statement (rule 1601) says:-

"1601 Purpose of Zone

This zone provides for uses in areas of land which are never likely to be used for any urban purpose even beyond the planning period. A large portion of this zone abuts the Special Rural Zone of the Piako County Council's District Scheme and similar uses are proposed for this zone. Some areas are steep country and other areas are subject to flooding or are under the shadow of Mount Te Aroha and unsuited to urban development. The open and visually aesthetic character of this zone is to be retained by having large standard area and frontage requirements and not providing for any use involving the intensive use of buildings".

It is common ground that the proposal is a non-complying activity under the transitional district plan.

Proposed District Plan

The proposed district plan is at the point where submissions and cross submissions have been filed. The hearings have just been commenced, but no decisions have yet been delivered. In considering the weight that should attach to the proposed district plan we were referred by Mr Arcus to the comments of Hammond J in *TV Network Services Ltd v Waikato District Council*[1] where His Honour held at p.17:

> *"In the event ... it cannot be the position that the PDP (proposed district plan) entirely governed this consent application. For, as Mr Williams rightly said, the TDP (transitional district plan) was still in full force and effect at all relevant times. Therefore consent (as for a discretionary activity) was still required".*

His Honour then went on to hold that the application was to be determined on the basis of the transitional plan, but in the exercise of the discretion that was required in that process it took into account the proposed district plan.

In considering the weight that is to be given to the proposed district plan we take into account that the transitional district plan was made operative in June 1979 and that accordingly a review of this document is well overdue. We also note that the proposed plan continues (under the Resource Management Act regime) to recognise conservation, landscape and recreational amenity values in the location of this site.

[1] AP 55/97 (Judgment 12 September 1997).

There was disagreement about the status of the activity under the proposed district plan. It was submitted by Ms Allin on behalf of the applicant that the proposal is to be considered as a discretionary activity whereas the respondent and the appellants submitted that the proposed activity is non-complying. All counsel, particularly Ms Allin and Mr Arcus, set out in some detail the reasons why they maintained their respective positions. We accept the submissions of Mr Arcus in this respect and hold that the proposed activity is a non-complying activity under the proposed district plan. We see no need to give a detailed analysis of the respective submissions of counsel as the proposed district plan is not determinative of whether the threshold test is to apply. We rely primarily on the operative transitional district plan which is still in force and pursuant to that plan the activity is non-complying.

There are a number of relevant objectives and policies in the proposed district plan all of which were detailed with some considerable care by both Mr Kivell, the planning consultant called by the applicant, and Ms Paula Rolfe, the district planner summoned to give evidence by the appellants, Howitt and Caird.

Schedule 2 of the proposed district plan is headed **"Heritage - Waahi Tapu"**. Site reference 77 in schedule 2 records Mt Te Aroha as **"Maori Historic Sacred Mountain"**.

Under the proposed district plan the subject property is within the Conservation Zone with the rear of the site being identified as a Designation as "Water Supply and Pipe Line". The designating authority is the respondent and it has approved the proposal pursuant to section 176 of the Resource Management Act.

Clause 2.2 is headed **"Significant Resources of the District"** and we note that it includes the following:

> *"The district is 182, 150 hectares in area of which 3, 560 hectares is held in Maori title. The four tribal groups with mana whenua in the district are Paoa, Tainui, Raukawa and Hauraki. Te whenua, the land, is to the Maori one of the most important aspects of their culture providing equal opportunities and social identity, spiritual strength and the symbol of social stability. The district plan must aim to acknowledge the traditional concepts of turangawaewae (a place to stand, a sense of belonging, a home marae) and ahi ka (keeping the home fires burning), and the strong trend toward whakamahana nga marae (a return to rural areas and strengthening of rural marae communities)".*

Clause 3.1 is headed **"Natural Environment and Heritage"** and includes the following:

> *"Outstanding natural features and resources in the district are threatened by activities that would modify, destroy or compromise their outstanding qualities. The district contains some nationally and regionally outstanding natural features which Council must ensure are protected from adverse effects. In the majority of cases areas such as the Kopuatai peat dome and the Kaimai-Mamaku ranges are held as reserve or in public ownership. The challenge for the district plan is to ensure protection by managing activities with adverse effects in and adjacent to these areas and to ensure protection of outstanding natural resources in private ownership".*

Relevant objectives and policies in relation to this appeal include:-

- ***Clause 3.1.2 - Natural Environment and Heritage***

1. Landscape character

Objective 01 — *To retain and enhance the varied landscape qualities of the district.*

Policy P1 — *The scale, location and design of buildings, structures and activities in significant landscape character units of the district should:*

- *preserve the elements which contribute to its natural character;*
- *not detract from the amenity values of the landscape.*

2. Natural Environment

Objective 01 — *To protect and enhance the natural resources within the district that are valued for their intrinsic, scientific, educational and recreational values.*

Policy P3 — *Outstanding natural features, areas of indigenous vegetation or habitats of indigenous fauna are to be permanently protected at the time of subdivision, use and development.*

3. Heritage

Objective 01 — *To recognise, protect and enhance significant heritage resources which are valued as part of the district heritage.*

Policy P1 — *Activities in the vicinity of significant heritage resources should be sensitive to their original forms and features.*

Policy P4 — *Activities which adversely affect significant recorded archaeological sites and waahi tapu should be avoided or diverted.*

- ***Clause 3.5.3 - Amenity***

2. Design Appearance and Character of Built Environment

Objective 01 — *To ensure the design and appearance of buildings and sites is in keeping with the character of the surrounding townscape and landscape.*

- ***Clause 3.7.2 - Works and Network Utilities***

Objective 01 — *To manage the effective provision of works and utilities so as to minimise the adverse environmental effects and minimise community benefit.*

Policy P1 *To encourage the co-siting of facilities where technically practical to minimise adverse environmental effects, particularly the impact of multiple masts and lines on the landscape.*

The underlying zoning for the site is the Conservation Zone. The Conservation Zone has been applied to "significant natural landscapes and habitats". The zone applies to areas to protect or enhance the natural, intrinsic, or other recognised values. The provisions of the zone are designed to achieve the conservation emphasis. The rules of the zone contain assessment criteria for discretionary and non-complying activities under clause 1.4.12 and these include:-

- *Any proposal for use and development shall as far as practicable, be located, designed, constructed or placed to complement the character of the environment in which it is located.*
- *The location and extent of any archaeological cultural and historic sites within any area subject to the application and how they will be affected by the proposal.*
- *The likely impact of the proposal on natural landform in terms of visual appearance, and the potential for subsidence or erosion (including stream banks).*

Threshold Tests

In the light of that background and having regard to the various planning instruments we now turn to the threshold tests that need to be applied under section 105(2)(b).

First, we deal with the adverse effects on the environment. After a careful consideration of the evidence we are of the view that the adverse effects on the environment are more than minor. During the course of the hearing it became apparent that the two major issues in this case so far as effects on the environment are concerned related to the effect of the proposal on the visual amenity of the area and the effect of the proposal on the tangata whenua and their relationship with their ancestral lands. We discuss both of these matters in greater detail later in this judgment and what we there say is relevant to our conclusion that the first limb of the threshold test has not been satisfied.

We now turn to the second limb. We are also of the view that granting the consent will be contrary to the objectives and policies of the plan and of the proposed plan. We have come to this conclusion after carefully considering the overall purpose and scheme of the transitional plan. The transitional plan identifies the area as a conservation type area and

the rules are designed to preserve the visually aesthetic character and open space of the area and to limit the intensive use of buildings.

The area has been identified as a Conservation Zone in the proposed plan which contains even more detailed provisions than the transitional plan to ensure the retention of its visual amenity and open character. Further, the proposed plan recognises Mt Te Aroha as a sacred mountain to the tangata whenua giving to it waahi tapu status. The provisions of the proposed plan clearly recognise the desirability of protecting significant natural and cultural heritage resources and avoiding interference to heritage resources of significance to Maori, and we find that the proposal is contrary to these policies. We accordingly are of the view that the second limb of the threshold test has not been met.

Exercise of Discretion

While we have held that the proposal does not meet the two limbs of the threshold tests under section 105(2)(b) we are nevertheless of the view that even if the proposal did satisfy one or other of those limbs we would exercise our discretion against granting of the consent.

In the exercise of our discretion we are mindful of taking into account all relevant factors in section 104 and Part II.

At the hearing it very soon became apparent, as we have already noted, that the two main issues arising out of this appeal related first to the effect of the proposal on visual amenity and second the effect of the proposal on the tangata whenua. We will deal with each of these matters in turn.

Before doing so we are conscious of the fact that the establishment of the proposed cell site will be of considerable benefit to the community - at least to the customers of the applicant. We accept the evidence that cellphones have an increasingly important role not only for business people but for people in everyday life. This must be weighed against the adverse effects of the proposal. We are of the view that the adverse effects of the proposal will be

minimal save for the two main issues already mentioned. We now deal with each of those two issues in turn having regard to Part II matters referred to and s.104.

VISUAL AMENITY

The appellants, Howitt and Caird, are both residents on the uphill side of Puriri Street backing on to the Conservation area where the proposed Telecom installation is to be located. Mr Caird's residence is on the northern side of and immediately adjacent to the land which was formerly the continuation of Lawrence Street. Mr Howitt resides next-door but one to Mr Caird.

Both appellants were submitters at the lower hearing opposed to the proposed installation.

Messrs Howitt and Caird submit that the mast will appear to be right outside their backdoor - an area where they have private living space. They also claim that there will be adverse visual effects in respect of the outstanding natural feature and landscape because the mast will be visible and will reaffirm that utilities in the Conservation Zone are acceptable. (We received into evidence a photo montage which demonstrated that the mast would be visible to the majority of residents and visitors to the town).

The appellants also claim that there will be adverse effects in relation to the recreational use of the area. The surrounding area is served by numerous walking and mountain biking paths. It was submitted that the proposed installation would impose a commercial facility of significant proportions when viewed from the track immediately adjacent to it which would impair the wilderness experience.

Mr Howitt gave evidence of his opinion that the Te Aroha community as a whole has pride in the mountain and its environs including the foothills, in that the area is a focal point for many tourists who are attracted to the locality. In his opinion the proposed Telecom antenna is an intrusion in that natural landscape and feature. He noted that:-

> *"It is no consolation to say that there is already a substantial installation at the top of the mountain. The people of Te Aroha have had no say in that. Neither did the tangata whenua. There would be many in Te Aroha, myself included, who would prefer that the mountain top mast were not there. I consider that an additional mast, albeit on the foothills, just makes the position worse".*

This evidence was supported by the planning evidence of Ms P J Rolfe, District Planner for the Matamata-Piako District Council, appearing under summons. Ms Rolfe's report to the Council on the original resource consent application included the following in its summary:-

> *"The locality, including the site, has high amenity values. These values include:-*
>
> - *Being part of an outstanding natural feature identified as a matter of national importance under the Resource Management Act.*
>
> - *Defining the character of and conferring a "sense of place" on Te Aroha.*
> - *Visual landscape values; and as a passive and active recreational resources. The zoning in the proposed district plan confirms and strengthens the current uses by imposing a Conservation Zone over the site and its surrounds".*

Ms Rolfe's summary also included these statements:-

> *"The mast and antennae will have an adverse effect on the visual amenity of the area. The site is within 70 metres of a residential zone. This proximity is significant in terms of the adverse effects on the visual amenity of the mountain views ...".*

We note that Ms Rolfe's report at 9.1.2.5 recognises that the integrity of the "bush" experience is already compromised at this location by the water reservoir and ancillary buildings which exist there. She then goes on to say:-

> *"Nonetheless the visual impact from the vertical structure of the mast would be greater because a height of mast towering over the landscape is more difficult to mask from recreational users than would be the bulk of the reservoir".*

In her opinion mitigation could be achieved at close proximity to the base of the mast by planting but other views would be compromised to various degrees. On this point too, we note Mr Szikszai's evidence that the presence of trees in front of the mast may operate to block the reception of the site.

We have visited the site and we agree with Ms Rolfe that the landscape amenity has been devalued by the water reservoir and by the power lines and supports that serve it. We agree too that it is part of the town back drop and that in the end the inter-face will always be under pressure.

In considering the visual amenity of the area we also consider the cumulative effects. Ms Rolfe's original report highlighted the two possible interpretations of attempting to site the mast in an already compromised situation. The first approach is siting the mast with the structures implements a co-siting philosophy which is encouraged by modern approaches to environmental management. It is considered that the theory behind this is that the co-siting creates minor incremental adverse effects rather than introducing a completely new and incompatible structure within a landscape. On the other hand it does not pay to be ahistorical. Ms Rolfe's report noted that for technical reasons the tank was sited in its location in an era when landscape values held a different significance, and that the technology available in 1967 offered fewer options. She also noted that, in her opinion, the scale and proportions of the water tank are less obtrusive than a mast. She drew attention to the fact that the landscape is already degraded and considered that this may provide an even stronger reason to prevent the cumulative adverse effects of an additional structure such as the 24.4 metre mast on the same site.

In response, the respondent's planning consultant, Mr Russell De Luca concluded that the cell site will not be visually obtrusive in the landscape, taking into account the height of the mast as well as the location and topography of the property. It was Mr De Luca's evidence that any visual impact will be mitigated by:-

(a) The proposal to paint the mast dark green to ensure that it blends in with the natural vegetation back drop; and

(b) The implementation of an appropriate planting programme to further soften any visual effect that the cell site may have.

Mr De Luca considered that the mast would not be visible above any ridgeline and should blend in with the backdrop of native vegetation. In the wider visual context of the mountain's landscape, any effects would be no more than minor.

We were reminded of the recent decision *Telecom New Zealand Limited v Christchurch City Council* (W165/96). That case also dealt with a proposal to establish a cell site. At pages 35-36 of that decision the Court said:-

"It is important to recognise that in deciding whether some particular activity has an adverse effect on the environment, it does not become so merely because some part of the community does not like the look, size or scale of a proposed development. It is the definition of environment in its totality which must be taken into account and it cannot, in our view, be said that this technology utilising as it does

> *physical resources, and contributing significantly to the social and economic wellbeing of a large group of the community could be said to be adverse to the environment merely because by its very nature it has an appearance in scale which some people find distasteful".*

Mr De Luca's evidence was supported by the evidence of Mr D G McKenzie a landscape architect called to give evidence by the applicant. Mr McKenzie acknowledged that the landscape of the town of Te Aroha is directly influenced by Mt Te Aroha rising to the east and the Hauraki Plains spreading to the west. He told us that the town is located on the edge of these two features with its development extending along the base of the mountain and out on to the plains.

Mr McKenzie was of the view that notwithstanding the dominance of Mt Te Aroha in the landscape setting a number of mitigation measures designed to minimise the visual impact can be undertaken. It is his view that these measures, together with the level of screening from the surrounding vegetation, the existing structures in close proximity, the western outlook from surrounding properties and visual "absorption" provided by the backdrop of land form and vegetation, would lead to the visual impact of the proposed cell site being no more than minor.

Mr McKenzie produced a number of photographs and from those photographs developed photomontages showing views of the site from various viewpoints in and around the township of Te Aroha. We did not find the photomontages particularly helpful. This became apparent on our site visit. Photographic frames are frozen. They do not portray the ever-changing light effects caused by the passage of the sun across the sky not to mention the effect of changing weather conditions. When we made our site visit it was in the late afternoon when the sun was in the west and the site was bathed in the sunshine. It would appear from the photographs produced by Mr McKenzie that some of them at least were taken in the early hours of the morning when the sun would have been in the east. We are grateful to Mr McKenzie for the careful preparation of his evidence. Notwithstanding that evidence however we accept the evidence of the appellants to the effect, even although it will be painted dark green, that the mast will undoubtedly be visible to the majority of residents and visitors to the town, and especially so as the sun moves around to the West. We are of the view that the mast will have an adverse visual effect on what is an outstanding natural feature and landscape.

We agree with Ms Rolfe when she told us that:

> *"The mountain defines the unique character of the locality in many ways. Its topography dominates the area; it becomes a navigational instrument for travellers across the plains and creates typical weather patterns".*

All persons exercising functions and powers under the Resource Management Act shall recognise and provide for the protection of outstanding natural features and landscape, for appropriate subdivision, use, and development[2]. Mt Te Aroha clearly constitutes an outstanding natural feature and landscape. This fact was not contested. We are of the view that to allow this proposal would be to compromise the strong statutory direction and intent of section 6(b).

Tangata Whenua Concerns

One of the grounds of appeal is that the decision granting resource consent failed to appropriately recognise tangata whenua concerns. As submitted by Ms Mapuna Turner, as representative of the s.274 party, Hutana McCaskell (and as adopted by the appellants in this case):

> *The respondent in exercising its functions and powers as decision maker of the resource consent application by Telecom New Zealand:*
>
> *(a) failed to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga pursuant to section 6(e) and s6(b).*
>
> *(b) did not have particular regard to Kaitiakitanga pursuant to section 7(a).*
>
> *(c) failed in its duty to take into account the principle of consultation with tangata whenua under section 8 of the Act.*
>
> *(d) failed to have regard to the relevant objectives, policies, rules and other provisions of the proposed Matamata-Piako District Plan pursuant to section 104(1) and (6).*
>
> *(e) has demonstrated an inconsistency pursuant to sections 72, 73, and 75.*

Further, it was submitted that:

> *The applicant did not provide for nor have particular regard to:*
>
> *(a) consultation procedures established by tangata whenua from the initial stages of the application process.*
>
> *(b) recognising and providing for the relationship of Maori and their culture and traditions with the ancestral lands, water, sites, waahi tapu and other taonga.*

[2] Section 6(b) RMA.

The interpretation of the Part II matters was therefore squarely raised by the appellants. In considering the arguments the factual evidence is not really in issue. (We discuss the circumstances below). Both sides appear to have similar recollections of what occurred, give or take some minor differences. The critical difference between them centres on the requisite performance of the statutory obligations contained in Part II of the Act.

Sections 6, 7 and 8 all begin with the same phrase, which indicates that each has a direct relationship to achieving the purpose of the Act, which is sustainable management as defined in section 5[3]. For this reason section 8 does not stand alone, nor does it feed directly into the provisions of section 6(e), or section 7. We note the different weights given to the consideration required for each section under Part II of the Act, and due regard is had to these. Turning to the Act, we consider it is useful to begin with a consideration of section 8. For convenience this is reproduced below:

> ***8. Treaty of Waitangi -***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

Although rather short and seemingly clear, section 8 has generated a substantial amount of discussion, and the Environment Court has formulated differing interpretations over time as the jurisprudence has developed. Much of the discussion up until 1996 concerned whether section 8 confers an obligation upon the Council (in its various roles) to consult with tangata whenua over resource consent applications. The main branches of approach can be roughly summarised[4] as the "obligation" line of decisions (following on from *Gill*[5]), and the "no obligation" decisions (developing the *Ngatiwai*[6] line of reasoning).

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[3] See *Auckland City Council v Smith* 4 NZPTD 447

[4] We do not pretend to have compiled a complete list of decisions on this section, and reiterate that the distinction between the two approaches is not always clear, given that decisions are often particular to the circumstances of the case rather than general statements of principle.

[5] *Gill v Rotorua District Council* (1993) 2 NZRMA 604
Haddon v Auckland Regional Council [1994] NZRMA 49
Wellington Rugby Football Union Incorporated v Wellington City Council (W84/93) Planning Tribunal, 30 September 1993
Quarantine Waste (NZ) Ltd v Waste Resources Ltd [1994] NZRMA 529 (HC)
Whakarewarewa Village Charitable Trust v Rotorua District Council (W61/94) Planning Tribunal, 25 July 1994

[6] *Ngatiwai Trust Board v Whangarei District Council* [1994] NZRMA 269
Harrison v Auckland City Council [1994] NZRMA 289
Rural Management Ltd v Banks Peninsular District Council [1994] NZRMA 412

Consultation:

As developed in the *obligation* line of cases, an obligation to consult under section 8 arose from the understanding that consultation was one of the principles of the Treaty of Waitangi, following the Court of Appeal decision in *New Zealand Maori Council v Attorney General*[7]. Generally, the obligation was thought to apply to the council's officers, and the council (in its quasi-judicial role) then had to 'take account' of the relevant material and principles. The principle of informed decision making also required sufficient consultation to ensure that the relevant material was available for the decision-maker to give the matter the appropriate consideration.

The *no obligation* cases, (notably *Greensill, Tawa* and *Banks*[8]) generally considered consultation to be good practice, but did not determine it to be mandatory for either applicants or council officers. [Some of these decisions required consultation, but the requirement rested upon the specific facts of the case.]

We note that section 8 does not mention consultation, but refers to the principles of the Treaty. In 1987 the Court of Appeal was required to consider the Treaty[9]. The case arose after the passing of the State-Owned Enterprise Act 1986. Five judges convened for the purpose - a special full Court - and each delivered a separate judgment. The Act expressly provided that the Crown was not to act *"in a manner that is inconsistent with the principles of the Treaty of Waitangi"*.

Speaking of this, Cooke P said:

Greensill v Waikato Regional Council (W17/95) Planning Tribunal, 6 March 1995
Tawa v Bay of Plenty Regional Council (A18/95) Planning Tribunal, 24 March 1995
Banks v Waikato District Council (A31/95) Planning Tribunal, 20 April 1995
Paihia District Citizens Association Inc v Northland Regional Council (A77/95) Planning Tribunal, 10 August 1995
Isobel Berkett v Minister for Local Government (A103/95) Planning Tribunal, 10 November 1995 (interim decision) [The final decision (A6/97) held there was an obligation for the council officer to consult in the circumstances of the case.]
Mangakahia Maori Komiti v Northland Regional Council [1996] NZRMA 193
[1989] 2 NZLR 142
See above for citations
New Zealand Maori Council v Attorney General [1987] 1 NZLR 641

> *"... What is now our responsibility is to say clearly that the Act of Parliament restricts the Crown to acting under it in accordance with the principles of the Treaty. It becomes the duty of the Court to check, when called on to do so in any case that arises, whether that restriction has been observed and, if not, to grant a remedy. Any other answer to the question of interpretation would go close to treating the declaration made by Parliament about the Treaty as a dead letter. That would be unhappily and unacceptably reminiscent of an attitude, now past, that the Treaty itself is of no true value to the Maori people ...".*

And later Richardson J touched on the same matter of the true nature of the Treaty. After speaking of the need for rational dialogue, careful research and generosity of spirit, he said:-

> *"... It is not necessary for the purposes of this case to attempt to write a general treatise on the subject ... . There is however one overreaching principle - to which I shall return - which in its application here is sufficient to answer the present case. It is that considered in the context of the SOE Act, the Treaty of Waitangi must be viewed as a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation in New Zealand was to become possible. For its part the Crown sought legitimacy from the indigenous people from its acquisition of sovereignty and in return it gave certain guarantees. That basis for the compact requires each party to act reasonably and in good faith towards the other ...".*

Each of the other three judges spoke in similar terms of "partnership" and of the duty of the partners to act fairly and reasonably towards each other.

The question now confronting us is how to spell out this concept of partnership between Maori and non-Maori so as to give proper recognition to Maori New Zealanders and their rights under the Treaty to the extent that the Treaty is incorporated into the Resource Management Act.

A review of the Court of Appeal cases and of the opinions expressed in the reports of the Waitangi Tribunal clearly establishes that the Courts and the Waitangi Tribunal have articulated only those principles which it has thought relevant to the cases before it, adopting a case by case approach. The same can be said of the decisions of this Court. The analyst must be careful not to readily extract principles of general application from decisions given in respect of individual fact situations.

Clearly the principles are not to be founded in tablets of stone like the Ten Commandments. It is not possible to promulgate a comprehensive or complete set of Treaty principles. Indeed it is undesirable to attempt to promote a definitive or exclusive set of Treaty principles because the Treaty is a living and continuing document which calls to be

interpreted and applied not simply as at 1840 but in a contemporary setting. Cooke P said of the Treaty:-

> *"What matters is the spirit, ...".*

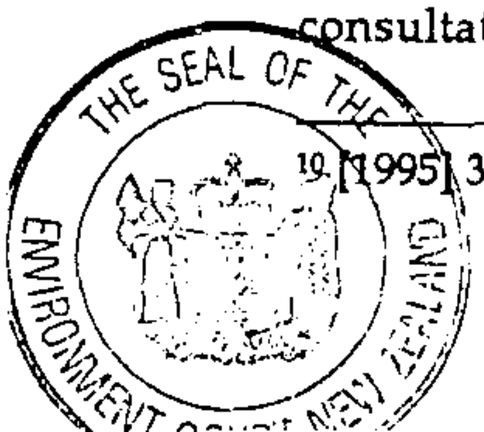
This Court is required to look at the circumstances of each case before it and to take account of the need to act reasonably and in good faith remembering that this duty is not one-sided. It applies both to persons exercising functions and powers under the Act and also to Maori. To act reasonably and in good faith requires the actions of all parties to reflect an underlying fairness.

The relevant principles as defined by the Court of Appeal and the Waitangi Tribunal include consultation, active protection and rangatiratanga, such principles having their genesis in the essential bargain of the Treaty vesting rights and obligations in both parties. It is our opinion that the question of consultation is to be approached in a holistic manner, not as an end to itself, but in order to take the relevant Treaty principles into account. We have been guided by the comments of the Court of Appeal in *Ngai Tahu Maori Trust Board v Director General of Conservation*[10] in particular to p560 of that decision where Cooke P (as he then was) said in discussing relevant treaty issues:

> *"Such issues are not to be approached narrowly ... the Crown is not right in trying to limit those principles to consultation. Since the lands case, New Zealand Maori Council v Attorney General (see especially pp 664, 674, 682, 693, 703, 717) it has been established that the principles require active protection of Maori interests. To restrict this to consultation would be hollow."*

Realistically, active protection of Maori interests requires positive action. It also requires access to sufficient information of an appropriate quality to be in a position to fully consider the implications of the application on those interests. Certainly there will be times when that duty obliges the person reporting to the council to engage in consultation with the tangata whenua. At other times, depending on the circumstances, an applicant's consultation may be sufficient.

The council is also the central repository of information collected during the mandatory consultation processes required by the Act under clause 3 of the First Schedule when



10 [1995] 3 NZLR 553

preparing a plan or policy statement, and is therefore also in a position to advise the applicant on the appropriate consultation to be undertaken.

Where, as in this case, the proposal affects a mountain referred to in the proposed district plan as "Maori Historic Sacred Mountain" and is recognised as waahi tapu we consider section 8 obliges the Council to initiate, facilitate and monitor the consultation process as part of the duty to take into account the principles of active protection and rangatiratanga. This does not exclude a duty to consult where appropriate. In our view the respondent in this case fell well short of its obligations. Such consultation as did occur was initiated at a late stage by the applicant. In the circumstances this Court is required to take into account any failure to adequately consult.

The appellants claim that there has been a failure on the part of both the Council and the applicant to take the principle of consultation (under section 8) into account.

The facts which are more or less common ground are these:

Ms Mapuna Turner gave evidence that personal contact about the application was established by a telephone call to the Hauraki Maori Trust Board (to Ms Turner) from Graeme Matheson of Works Consultancy. Ms Turner advised him that Telecom would need to consult at the hui level. No objection to the proposal had been lodged and it was the applicant's evidence that Ms Mapuna Turner had advised the applicant to proceed and lodge the application. This was at the 2 of September 1996. However Ms Mapuna Turner did reserve the right of the iwi to lodge submissions following discussion of the application at a Ngati Ngarahiri Tumutumu hui a hapu scheduled for the 13 of September. The subsequent hui of 13 of September was not attended by Telecom. The tangata whenua declared their objections to the project on the grounds of Te Aroha mountain being waahi tapu from the summit to the river. Two faxes from Mr Matheson were received as exhibits at the hearing, one dated the 19 of September and the other the 20 of September and both addressed to Ms Mapuna Turner. The subject of the fax of the 19th reads:

> *"How did your meeting go on the 13 of September regarding the proposed Te Aroha cell site. Could you please forward us a written response as soon as possible for our records".*

The fax of the 20th reads:

> *"I spoke to Paul Ryan regarding the Te Aroha cell site. From your conversation with him on 19 September 1996, it would seem that there are no significant cultural sites in the vicinity of the proposed cell site. Could you please fax a written response to Julia Bosher of this office which confirms this or otherwise. Your urgent attention to this would be much appreciated."*

For the applicant their evidence is that consultation with local iwi had been conducted mainly through the contact with Mapuna Turner. The Commissioner's decision cites the evidence of Mrs Abraham representing the local hapu and recognises that her primary concern was the possible dangers to health. It was also Mrs Abraham's evidence that Mt Te Aroha in its entirety including the subject site was waahi tapu. But Mrs Abraham's evidence was on behalf of one hapu only. The respondent (in their planning instruments) recognised the importance of Te Aroha for a multiplicity of tribal groups. The silence from these groups, given the established protocols, does not match up to the statement in the commissioner's decision that these interests had not been compromised.

To our mind, the appellant is correct to the extent that prior to the Council hearing inadequate attention was paid to the section 8 obligations to take the principles of the Treaty into account. To fulfil those requirements in the circumstances of this case would have (at least) required substantially more active participation in the consultative process, especially given that the Council and the appellants had an agreed protocol (fully described in the evidence of Ms Mapuna Turner) for dealing with resource consent applications of relevance to Maori. There is no doubt that the appellants consider that the site of the application is part of an extensive waahi tapu area, which covers the whole of the mountain, Te Aroha. (We consider the status of the site below, under the discussion on section 6).

We now consider the effect of the subsequent actions of the respondent and applicant, which took place prior to the appeal hearing before this Tribunal. We have been guided in our consideration by the recent Court of Appeal decision *Fleetwing Farms Ltd v Marlborough District Council*[11], particularly the discussion on the nature of appeals under the Resource Management Act (at pages 257 - 258). It is clear from that discussion that the Resource Management Act "reflects the well settled rule of the Planning Tribunal under the earlier

[11] 3 ELRNZ 249

town planning legislation. The leading case is *Ross v Planning Appeal Board*[12]...". It was said in that case (at 217) that:

> *"... a hearing de novo by an appeal board, although described in the Act as the hearing of an appeal (s42(1)), is in substance an exercise by the board of an original jurisdiction to determine the application or objection completely afresh, on the basis of the evidence before it and in the light of the circumstances prevailing at the time of its decision."*

In considering the application completely afresh, the Tribunal must consider the evidence which is before it and the circumstances at the time of its decision: part of the evidence and the circumstances in this case concern the process of consultation subsequent to the consent authority hearing.

Ms Mapuna Turner at 7.12.8 of her evidence stated:

> *"a full and thorough consultation process by the applicant with iwi was conducted on September 13 1997, approximately one year to the day of the first established contact to advise of the application for a resource consent to establish operate and maintain a cellular radio communications cell site".*

It was Ms Turner's evidence that Telecom re-established contact after the appeal was lodged by the appellant and that she was contacted again by a Mr P Ryan to meet with Telecom officers, a property manager, and others at Paeroa this year. The appellants had sent a letter to the Kaumatua Council requesting support for their stance that Te Aroha Mountain was waahi tapu from the summit to the Waihou River. A full consultation hui occurred at the Tumutumu Marae Te Aroha on the 13 of September 1997 and presentations were given by Dr Black, the engineer, Justine Rae, the property manager, and facilitation occurred by Mattie Blackburn, and Mr & Mrs Haunui, (two kaumatua commissioned for the observance of marae protocol). Mattie Blackburn, a Maori consultant, facilitated the consultation between Telecom and tangata whenua.

We find on the evidence before us that these actions and discussions indicate that the appropriate action was taken by the respondent and the applicant - albeit at a very late stage. However, as the Court of Appeal said, and we have noted above, the principles are more than just consultation. There is the obligation to recognise tino rangatiratanga which includes management of resources and other taonga according to Maori cultural

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[12] [1976] 2 NZLR 206 (CA)

preferences. There is also the obligation of active protection. Not only must this Court take account of the principles under s.8 but section 6(e) requires us to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites and waahi tapu, and other taonga.

We now deal with s.6 of the Act. Ms Turner gave the following evidence:

> *"The actions of the respondent and the applicant in this matter seem to infer that Maori relationships with the environment and Maori values are a secondary consideration.*
>
> *This inference is gleaned from the knowledge that despite tangata whenua provisions in the proposed district plan, despite the protocols for consultation outlined in the charter of understanding between Council and tangata whenua, all of which were outcomes of a series of consultation hui with tangata whenua over a period of approximately 4 years and prior to the lodging of the application, the respondent chose to disregard and claim that the relevant sections pertaining to these matters were not compromised ...*
>
> *Mt Te Aroha is one of two significant landmarks which establish the territorial boundaries of the Hauraki tribes. It has been determined by tangata whenua and supported by the Kaunihera Kaumatua of Hauraki as waahi tapu. It has been scheduled in the proposed district plan".*

Ms Turner also notes that the land in which the proposed cell site is to be located is zoned Conservation under the proposed plan. She reminds us that the respondent was unlikely to be ignorant of the fact that Maori consider the conservation estate consists predominantly of Maori land commandeered by the Crown. She also states that tangata whenua were not consulted regarding the acquisition of this land by Council. Interestingly, the report written by Ms Rolfe, for Council on the iwi consultation for the Te Aroha Mountain Railway resource consent application, notes that Mt Te Aroha is one of the two most sacred mountains in Hauraki. Moehoe Mountain is the other, located near Coromandel.

Ms Rolfe also notes that Mt Te Aroha was identified by the kaumatua of all of the tribes of Hauraki as a sacred site from the summit down to the river. She said that "we were also reminded that Mt Te Aroha is identified as a waahi tapu in the proposed district plan which was released as a proposed plan in November 1996". The end of her report concludes "that Mt Te Aroha is a waahi tapu to the 12 tribes of Hauraki".

The respondents submitted that the present case can be distinguished from the facts of the *Tainui* decision for a number of reasons. We have given consideration to all of those reasons, but remind ourselves that each case must be considered on its own facts. A factual

comparison as between cases is not always that helpful. We have endeavoured to extract the principles and apply them to the facts of this case. For this reason we do not consider it necessary to discuss in detail all the distinguishing features raised by Ms Allin, save but one which we think it appropriate to address. One of the reasons advanced by Ms Allin for distinguishing the present case was the availability of alternative sites.

Ms Allin noted that other possible translator sites were available in the *Tainui* decision which were nearly as effective even though they involved greater costs. She drew our attention to Mr Szikszai's evidence as to the consideration of alternative sites and maintained that there was no real alternative to the proposed site.

We consider the matter of availability of alternative sites to be relevant in terms of the assessment under section 104(1)(a), in that the provision of a service which would not otherwise be available must be a positive benefit, to be weighed against adverse effects. We also consider it relevant to our assessment under section 104(1)(i), and have carefully considered Mr Szikszai's evidence. Under the Resource Management Act the existence of alternatives is not definitive.

Mr Szikszai outlined the following site selection criteria: location (in terms of providing the necessary coverage to customers); sufficient overlap with coverage from the existing sites; being capable of fitting into Telecom's long-term network plan; visual amenity and planning considerations. Engineering selection constraints included: the geographical placement of Te Aroha; the need for the site to be within 2 to 3 kilometres of the township; and the proximity of the area to Hamilton. The practicality of providing power and vehicle access to the site was also relevant.

We accept that a number of alternative sites have been ruled out as viable options because of their lack of technical performance. We note however Mr Szikszai's opinion that the use of a number of sites in and around Te Aroha is not a realistic alternative, because "this would involve obtaining access to property and resource consent for each site. The issue of site availability is also relevant" (at paragraph 4.13 of his evidence). We note that in cross-examination an option of a number of masts was put to Mr Szikszai. He agreed that it was an option, although it would not be "so efficient". We are, on balance, not persuaded that

other suitable sites could not be found, albeit perhaps not as efficient as the one currently proposed.

The respondent submitted that the proposal is not only for the best site available, but that it also recognises and provides for the relationships of Maori and their culture and traditions with the ancestral lands, water, sites, waahi tapu and other taonga.

In discussing the relevance of the Part II matters of the Act, namely sections 5, 6, 7 and 8, Hammond J stated[13]

> *"The importance of these sections should not be under-estimated or read down. For they contain the spirit of the new legislation". (6)*

He then went on to say:

> *"In my view Part II of the RMA is critical to the new statute. It requires courts and practitioners to approach the new machinery provisions, and the resolution of cases, with the horatory statutory objectives firmly in view. The fact that there are some difficult issues of interpretation of Part II itself, and its relationship with the rest of the RMA does not absolve consent authorities and courts from wrestling with those problems; or justify the side-tracking of Part II".*

We understand the learned Judge to be emphasising the guiding importance of these sections. Perhaps the word 'horatory' best illustrates this.

Recent decisions of the appellate Courts have considered the weight which is to be given to the opinions of tangata whenua, particularly when expressed on Part II matters. The clear signal is that there is no right of exclusionary veto. In his judgment, Hammond J said:

> *"As Salmon J noted in Minhinnick v Watercare Services Ltd (AK HC86/97; 3 September 1997) that would be impermissible. But that is not what is being asserted here; the Environment Court agreed with Tainui that on a proper evaluation the proposal should not advance. I cannot see any force in the suggestion that the Environment Court substituted the subjective views of Maori for a balanced, objective consideration of the relevant interests".*

The point was re-iterated as follows: *"A rule of reason approach must surely prevail: the question is whether, objectively, the particular kind of activity is intrinsically offensive to an established waahi tapu, or other cultural considerations".*

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[13] *TV3 Network Services Ltd v The Waikato District Council and the Tainui Awhiro Ngunguru Te Po, Ngunguru Re Ao Management Committee* (AP55/97)

In terms of the recognition of the interests of the tangata whenua, Hammond J did not deny the importance of such recognition, but neither does he give it paramount status. What is required is a consideration based on the circumstances. Thus:

> *"What the Court said was:*
>
> > *We judge that the influential factors in deciding this case are the combined strength of the directions of s.6(e) and of the proposed district plan, to respect the relationship of the tangata whenua with the ancestral land and waahi tapu area of the translator site. Both Parliament and the District Council have indicated the high value to be given to that relationship.*
>
> *Plainly, what the Court is saying is that both Parliament, and the relevant local authority are now at one as to the importance of recognising relevant interests of Maori".*
>
> ...
>
> *"It (the EC) acted consistently with the purposes of the new RMA, and the letter of it, in assessing what, in this case, was essentially a clash between technology and culture. In preferring the latter it was acting on evidence which was available to it; and making precisely the kind of choice the Act contemplates."*

The most recent Court of Appeal[14] decision on the issue (overturning the High Court decision on *Minhinnick,* and re-instating the Environment Court decision) supports Hammond J's reasoning. That Court held at 18-19:

> *"This question involves Mrs Minhinnick's proposition that the Treaty of Waitangi gives her a right to veto Watercare's proposed work and activity. Salmon J dealt with this point by saying that s.6 in its reference to the principles of the Treaty did not give any individual the right to veto any proposal. We entirely agree. It is an argument which serves only to reduce the effectiveness of the principles of the Treaty rather than to enhance them".*

With respect, we adopt the approach of Hammond J, namely that the Court must make a choice, consistent with the purpose and the letter of the RMA, based upon the evidence available, and bearing in mind the place and importance of Part II matters.

Determination

We have anxiously considered with care all of the evidence relating to this matter. On the one hand we can see benefits. There is little doubt that cellular phone technology has become an integrated part of modern life. To allow the proposal will improve and enhance the users of the applicant's network. While recognising that the need in this location of the applicant's service is not a requirement, the benefit to the community is an important

matter for us to take into account in exercising our discretion. The applicant has in the main acted responsibly and with thoroughness. However, the cultural sensitivity of Mt Te Aroha to the Maori people is such that we find that in the circumstances of this case technology must give way to culture. It is true that the sacred mountain has been compromised by the water reservoir and by the power lines and supports that serve it. This was done at a time when the relationship of Maori and their land and the cultural issues arising from that relationship were not taken account of. We cannot put that right. We can, after careful consideration and a balancing of all the competing issues, say that in these circumstances there is to be no more desecration.

Similarly, so far as the effect of the proposal on the visual perspective of the landscape is concerned the fact that the landscape is already degraded provides a stronger reason to prevent the cumulative adverse effects of a 20 metre mast on the same site.

For the foregoing reasons, on balance, and having considered all of the evidence put before us, we allow the appeal. The respondent's decision is cancelled. The application is refused.

Costs are reserved.

DATED at AUCKLAND this 11 day of December 1997

R. Gordon Whiting
Environment Judge

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THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 93/2021
[2022] NZSC 142

BETWEEN	WAIRARAPA MOANA KI POUĀKANI INCORPORATION Appellant
AND	MERCURY NZ LIMITED First Respondent
	WAITANGI TRIBUNAL Second Respondent
	ATTORNEY-GENERAL Third Respondent
	NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-Ā-RUA SETTLEMENT TRUST Fourth Respondent
	RAUKAWA SETTLEMENT TRUST Fifth Respondent
	TE KOTAHITANGA O NGĀTI TŪWHARETOA Sixth Respondent
	POUĀKANI CLAIMS TRUST Seventh Respondent
	RYSHELL GRIGGS AND MARK CHAMBERLAIN (ON BEHALF OF NGĀI TŪMAPŪHIA-Ā-RANGI HAPŪ) Eighth Respondents
	THE TRUSTEES OF THE RANGITĀNE TŪ MAI RĀ TRUST Ninth Respondent

SC 127/2021

BETWEEN	RYSHELL GRIGGS AND MARK CHAMBERLAIN (ON BEHALF OF NGĀI TŪMAPŪHIA-Ā-RANGI HAPŪ) Appellants
AND	WAITANGI TRIBUNAL First Respondent
	ATTORNEY-GENERAL Second Respondent
	MERCURY NZ LIMITED Third Respondent
	WAIRARAPA MOANA KI POUĀKANI INCORPORATION Fourth Respondent
	NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-Ā-RUA SETTLEMENT TRUST Fifth Respondent
	TAKERE LEACH ON BEHALF OF TE HIKA O PĀPĀUMA Sixth Respondent
	HAAMI TE WHAITI ON BEHALF OF NGĀTI HINEWAKA Seventh Respondent
	KINGI WINIATA SMILER Eighth Respondent
	THE TRUSTEES OF THE RANGITĀNE TŪ MAI RĀ TRUST Ninth Respondent
	RAUKAWA SETTLEMENT TRUST Tenth Respondent
	TE KOTAHITANGA O NGĀTI TŪWHARETOA Eleventh Respondent
	POUĀKANI CLAIMS TRUST Twelfth Respondent

Hearing:	9–10 February 2022
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Williams JJ
Counsel:	P J Radich KC, M K Mahuika and T N Hauraki for Wairarapa Moana ki Pouākani Inc J E Hodder KC, L L Fraser and K C Grant for Mercury NZ Ltd M R Heron KC, C D Tyson and H P Graham for Attorney-General M G Colson KC and M R G van Alphen Fyfe for Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust C F Finlayson KC, F B Barton and A L Clark-Tahana for Raukawa Settlement Trust P V Cornegé, F E Geiringer, and A S Castle for Ms Griggs and Mr Chamberlain No appearances for: Waitangi Tribunal Te Kotahitanga o Ngāti Tūwharetoa Pouākani Claims Trust The Trustees of the Rangitāne Tū Mai Rā Trust Takere Leach on behalf of Te Hika O Pāpāuma Haami Te Whaiti on behalf of Ngāti Hinewaka Kingi Winiata Smiler
Judgment:	7 December 2022

JUDGMENT OF THE COURT

A **The appeal by Wairarapa Moana ki Pouākani Inc in SC 93/2021 is allowed in part. The High Court's ruling that the Waitangi Tribunal has no power to recommend resumption in favour of a claimant without mana whenua is set aside. The appeal is otherwise dismissed.**

B **The appeal by Ryshell Griggs and Mark Chamberlain in SC 127/2021 and the cross-appeal by Mercury NZ Limited in SC 93/2021 are dismissed.**

C **Issues as to costs may be dealt with by memoranda if they are not otherwise agreed. Memoranda will be no longer than five pages and must be filed and served within 20 working days.**

REASONS

WINKELMANN CJ, GLAZEBROOK AND WILLIAMS JJ
(Given by Williams J)

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Introduction

[1] These two appeals and one cross-appeal raise important issues for the application of the Waitangi Tribunal's "resumption" jurisdiction.[1]

[2] In 2010, the Waitangi Tribunal delivered its three-volume Wai 863 report into the historical claims of Ngāti Kahungunu and Rangitāne of the Wairarapa region (the Wai 863 report).[2] The Tribunal largely upheld those claims. Rangitāne has since settled.[3] What became the Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust (Ngāti Kahungunu Settlement Trust) claimed a mandate to represent all of Ngāti Kahungunu ki Wairarapa, engaged in negotiations with the Crown on their behalf, and eventually reached a settlement (in fact, two settlements, as we come to). But at the same time, two Ngāti Kahungunu ki Wairarapa-related entities applied to the Tribunal for resumption of certain land in which they claimed a particular interest.

[3] First, Wairarapa Moana ki Pouākani Inc (Wairarapa Moana) sought resumption of 787 acres located in the Central North Island on the southwest bank of the Waikato river that formerly comprised part of the much larger Pouākani No 2 block (**the Pouākani land**). Wairarapa Moana is a Māori incorporation operated under Part 13 of Te Ture Whenua Maori Act 1993.

[4] The Pouākani land is the site of the Maraetai Power Station, now owned and operated by Mercury NZ Ltd (Mercury). As at October 2018, it was valued at more

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1 Resumption is the term used to describe the Waitangi Tribunal's power to, effectively, direct the return of certain categories of land subject to Treaty of Waitangi claims. Those categories are current or former state-owned enterprise land, Crown forest land and land belonging to tertiary education institutions. See below at n 16.

2 Waitangi Tribunal *The Wairarapa ki Tararua Report* (Wai 863, 2010) [Wai 863 Report].

3 See below at n 33.

than $600 million. The Pouākani land is not within the rohe of Ngāti Kahungunu ki Wairarapa. Rather it is in the rohe of Raukawa and Ngāti Tūwharetoa. It was held by hapū of those iwi until the late 19th century when the Crown acquired it. In 1916, the Crown agreed with the traditional owners of Lake Wairarapa and Lake Ōnoke in southern Wairarapa to exchange title to those lakes for what became the Pouākani No 2 block. Wairarapa Moana owns what now remains of that block on behalf of its Ngāti Kahungunu shareholders.

[5] The result of this complexity is that Wairarapa Moana's application is opposed by Raukawa (whose position is supported by Ngāti Tūwharetoa),[4] Mercury and the Crown.

[6] Second, Ryshell Griggs and Mark Chamberlain sought resumption of 10,313.8 hectares of Crown forest licence land located in coastal Wairarapa (**the Ngāumu forest**). They applied on behalf of Ngāi Tūmapūhia-ā-Rangi, a hapū of Ngāti Kahungunu with traditional rights (*take tipuna*)[5] in the Ngāumu forest (for ease of reference we refer to the applicants as Ngāi Tūmapūhia-ā-Rangi). The estimated potential value of the Ngāumu forest including compensation payable under the Crown Forest Assets Act 1989 is of the order of $290 million. The Crown opposed that application.

[7] In response to the applications by Wairarapa Moana and Ngāi Tūmapūhia-ā-Rangi, and to protect its position, the Ngāti Kahungunu Settlement Trust filed cross-applications for resumption.

[8] On 2 March 2020, and in response to Mercury's application to adduce evidence and make submissions on the possible resumption of the Pouākani land, the Tribunal

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4 In this context Raukawa is represented by the Raukawa Settlement Trust and Ngāti Tūwharetoa by Te Kotahitanga o Ngāti Tūwharetoa. A further element of complexity is that by joint memorandum dated 19 March 2020, the Pouākani Claims Trust advised that it now supports Wairarapa Moana's application. The Trust was established following the settlement in 1999 of claims by descendants of the original Raukawa and Ngāti Tūwharetoa customary owners of the larger Pouākani block: see Pouakani Claims Settlement Act 2000).

5 See below at n 96.

determined that it was precluded from hearing from Mercury by s 8C of the Treaty of Waitangi Act 1975.[6]

[9] On 24 March 2020, the Tribunal delivered certain "preliminary determinations" on the substantive resumption applications.[7] These determinations were issued as part of a continuing "iterative process" of engagement with claimants, the Crown and other affected parties. The Tribunal indicated that it was minded to grant resumption of the Pouākani land and the Ngāumu forest but not to either Wairarapa Moana or Ngāi Tūmapūhia-ā-Rangi. The Tribunal considered the Treaty-breaching prejudice suffered by these smaller claimant groups was insufficient to justify resumption and would result in unfairness to other claimants who would not benefit. Rather, prejudice suffered on an iwi-wide scale and in relation to the entire tribal estate, would provide the justification. Identifying a recipient capable of bearing that wider Ngāti Kahungunu ki Wairarapa mandate would be a matter for further hearings and consideration, although the Tribunal did not discount the possibility that the Ngāti Kahungunu Settlement Trust may eventually be found to be an appropriate recipient.

[10] Mercury then sought judicial review of the Tribunal's standing determination, and the Crown and Raukawa (the last-mentioned again supported by Ngāti Tūwharetoa) sought judicial review of the Tribunal's preliminary determinations. As we come to, the High Court dismissed Mercury's challenge but granted the applications by the Crown and Raukawa and referred the determinations back to the Tribunal for reconsideration.[8] This Court then granted the appellants' applications for leave to appeal directly to this Court and Mercury's application for leave to cross-appeal on the standing question.[9] Raukawa opposes Wairarapa Moana's appeal. The Ngāti Kahungunu Settlement Trust meanwhile takes a neutral position in

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6 Waitangi Tribunal *Memorandum-Directions of Judge C M Wainwright Concerning Application to be Heard from Mercury NZ Limited* (Wai 863, 2020).

7 Waitangi Tribunal *Determinations of the Tribunal Preliminary to Interim Recommendations Under Section 8B and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020) [Preliminary Determinations].

8 *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 (Cooke J) [HC judgment] at [6(a)].

9 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2021] NZSC 134; and *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2021] NZSC 183.

relation to the appeals, but (pending implementation of its settlement with the Crown) the Trust's cross-applications remain on foot.

The issues in this Court

[11] In broad terms, the issues arising in these appeals and our responses to them may be summarised as follows:

(a) Does the Tribunal's determination (albeit preliminary) that Wairarapa Moana is not a suitable recipient for resumption of the Pouākani land, render its appeal moot? (The mootness issue.)

We have found that the Tribunal's preliminary determination as to the suitability of Wairarapa Moana as a recipient of the Pouākani land was not final and may be revisited in the Tribunal's ongoing iterative process. The appeal is therefore not moot.

(b) Does the fact that Ngāti Kahungunu ki Wairarapa lacks mana whenua in relation to the Pouākani land count decisively against resumption in favour of any Ngāti Kahungunu interests, however configured? (The mana whenua issue.)

We have found that although mana whenua is a very important principle of tikanga, Ngāti Kahungunu's lack of it at Pouākani is not inherently disqualifying.

(c) What historical Treaty prejudice is relevant to the exercise of the Tribunal's resumption jurisdiction? (The relevant prejudice issue.)

Because this issue was not the subject of appeal (or at least was not directly so), we have made no final determination on it, but in light of the potential importance of the issue for future resumption cases and the narrower construction of the relevant provision which is favoured by William Young J, we consider it appropriate to comment, albeit preliminarily. We have identified certain matters of background and

procedure in relation to historical Treaty claims generally that may not have been brought to the High Court's attention.

(d) Did the Tribunal take into account all relevant matters when it determined (for the purposes of the Crown's interest liability) that the post-1992 delay in resolving the Ngāumu forest claim was entirely attributable to the Crown? (The Crown's interest liability issue.)

We have found, consistently with the High Court's view, that the Tribunal did not consider all relevant matters.

(e) Did the Tribunal correctly apply s 8C of the Treaty of Waitangi Act when it refused to hear from Mercury in the Pouākani land application? (The standing issue.)

We have found, consistently with the High Court's view, that Mercury does not have standing in the Waitangi Tribunal.

[12] These issues raise complex questions of fact and law. A reasonable appreciation of the context in which they arise is required. We therefore set out the various relevant layers of background and we must (unfortunately) do so at some length. We first discuss the statutory context and background to the resumption regime. Second, we summarise the Tribunal's 2010 historical findings in relation to the Ngāti Kahungunu ki Wairarapa claims. Third, we describe the negotiations that followed between the Crown and what became the Ngāti Kahungunu Settlement Trust. These led to a settlement this year, albeit one that is disputed by the appellants. Fourth, we summarise relevant details of the Tribunal's preliminary determinations in relation to the resumption applications.

[13] We make a general comment that, in the dissenting reasons of William Young J, he characterises our reasons in a number of different ways. While we have responded to some of these, our failure to respond to the others should not be taken as an indication that we accept his characterisation. Our reasons should be read in their own terms and mean what they say.

Statutory context and background to the resumption regime

[14] Section 5(1) of the Treaty of Waitangi Act lists the functions of the Tribunal. The relevant function is contained in s 5(1)(a) and is stated in general terms:

> … to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6:
>
> …

The other functions referred to in s 5 relate to the Tribunal's power to exclude resumable land from liability to resumption and its advisory role to Parliament in relation to the Treaty-consistency of any Bill before the House.

[15] Insofar as historical claims such as those the subject of these proceedings are concerned, s 6 relevantly provides:

> **6 Jurisdiction of Tribunal to consider claims**
>
> (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
>
> (a) by ... any Act (whether or not still in force), passed at any time on or after 6 February 1840; or
>
> ...
>
> (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown …; or
>
> (d) by any act done or omitted at any time on or after 6 February 1840 …,—
>
> and that the ordinance or Act … or the policy or practice, or the act or omission, was … inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.
>
> …
>
> (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

[16] The Tribunal's jurisdiction in relation to historical Treaty claims is unique in New Zealand's legal and constitutional framework. It inquires into the

Treaty-consistency of actions and policies of the Crown and Acts of the legislature, as well as failures to act, develop policy or enact legislation — all from 1840. Its yardstick is the "principles" of the Treaty — an acknowledgement that the texts in Māori and English "differ", and that the Treaty must speak relevantly in today's world.[10] It is a standing Commission of Inquiry with the power to undertake or commission its own research and to adopt "such aspects of te kawa o te marae" in its procedures as it thinks appropriate.[11] It comprises judges of the Māori Land Court and up to 20 other members.[12] Membership composition is intended to be both knowledgeable in the matters that come before it and reflective of the "partnership between the 2 parties to the Treaty".[13]

[17] Historical claims are complex. They relate to whole districts and cover a century and a half of interaction between Māori and the Crown. No less complex is the requirement to engage with contemporary claimant communities, often at different stages of readiness and recovery. These realities call for deep expertise and a willingness to be flexible.

[18] As the Wai 863 report demonstrates, the Tribunal takes a district-by-district approach. That is, it consolidates the multiple claims of iwi, hapū, whānau and individuals in a particular district into a single historical inquiry and receives evidence and submissions from claimants and the Crown in a staged process of hearings over the course of a year or (usually) more. It then reports its findings about the history of engagement between iwi and hapū and the Crown and settlers in the district. In the introduction to its Wai 863 report, the Wairarapa Tribunal put it this way:[14]

> In the Wairarapa ki Tararua inquiry district, there was a transition over a remarkably short period from Māori being the people with authority over their whole physical environment (volume I: *The People and the Land*), to a situation in the present where they own very little land and exercise virtually no authority over the circumstances that define their lives and environment (volume III: *Powerlessness and Displacement*). In between were several decades that we chronicle in volume II: *The Struggle for Control*.

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10 Treaty of Waitangi Act 1975, preamble. The Tribunal is encouraged to make recommendations that facilitate the "practical application" of Treaty principles.

11 Schedule 2 cls 5(9), 5A and 8.

12 Section 4.

13 Section 4(2A)(a).

14 Wai 863 Report, above n 2, at xlix–l.

[19] This process of seeking reconciliation through evidential inquiry supported by expert membership and inquisitorial procedures all explain why the Tribunal's remedial powers are generally recommendatory.

[20] There are partial exceptions to this in relation to Crown forest, tertiary education and state-owned enterprise land. These resulted from litigation between the Crown and Māori over the impact on Treaty claims of a proposal in 1986 to transfer certain Crown lands to independent state-owned enterprises. Section 9 of the State-Owned Enterprises Act 1986 (the 1986 Act) was engaged. It provides:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

[21] In *New Zealand Maori Council v Attorney-General* (the *Lands* case), the Court of Appeal declared that:[15]

> … the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

[22] As a result of that judgment and further negotiations between the parties, an agreement was reached, and the 1986 Act and the Treaty of Waitangi Act were amended to provide for a system of memorialising land transferred to state enterprises and for the Tribunal to have the power to compel the Crown (by binding "recommendation") to resume ownership of such land for return to Māori. As noted, this power is generally referred to as the Tribunal's resumption power.[16] This Court in *Haronga v Waitangi Tribunal* described the resumption power vested in the Tribunal as "adjudicatory".[17]

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15 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 666 per Cooke P (the *Lands* case).

16 Treaty of Waitangi (State Enterprises) Act 1988 introduced ss 8A–8H of the Treaty of Waitangi Act and ss 27–27D of the State-Owned Enterprises Act 1986 Act [the 1986 Act] to give effect to the agreement reached. Section 27C(1) of the 1986 Act refers to the Crown obligation to resume the land pursuant to the Public Works Act 1981 for the purpose of return to claimants. We discuss the amendments in relation to Crown forest lands in the context of our discussion of the Ngāumu forest land application.

17 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [88] per Elias CJ, Blanchard, Tipping and McGrath JJ.

[23] We will return below to other provisions enacted following the *Lands* case where relevant to the Mercury appeal and *New Zealand Maori Council v Attorney-General* (the *Forests* case)[18] where relevant to the Ngāumu forest, but for present purposes s 8A(2) and (3) of the Treaty of Waitangi Act provide the relevant power:

> (2) … where a claim submitted to the Tribunal under section 6 relates in whole or in part to [memorialised] land or an interest in [such] land … the Tribunal may,—
>
> (a) if it finds—
>
> (i) that the claim is well-founded; and
>
> (ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty, should include the return to Maori ownership of the whole or part of that land or of that interest in land,—
>
> include in its recommendation under section 6(3), a recommendation that that land or that part of that land or that interest in land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land or that interest in land is to be returned); or
>
> …
>
> (3) In deciding whether to recommend the return to Maori ownership of any land or interest in land to which this section applies, the Tribunal shall not have regard to any changes that, since immediately before the date of the transfer of the land or interest in land from the Crown to a State enterprise, or an institution within the meaning of section 10(1) of the Education and Training Act 2020, have taken place in—
>
> (a) the condition of the land or of the land in which the interest exists and any improvements to it; or
>
> (b) its ownership or possession or any other interests in it.
>
> …

[18] *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA).

[24] In summary, the Tribunal's resumption power is triggered if the Tribunal is satisfied that it has before it a well-founded claim that relates in whole or in part to land for which resumption is sought, and that compensation for, or removal of, the prejudice should include return of that land to Māori ownership (whether in whole or in part). In making its assessment, the Tribunal must ignore any improvements and alienations effected after the land is transferred to the state enterprise.

Waitangi Tribunal findings and Crown concessions on the Wairarapa historical claims

General findings (also of relevance to Ngāumu forest)

[25] We turn now to sketch out in general terms the essential thrust of the Tribunal's findings in its Wai 863 report in relation to the Wairarapa historical claims. These provide the factual foundation for the resumption applications and the settlement.

[26] The Tribunal found that Crown's native land purchasing policy and practice during the early colonial period (that is prior to removal in 1865 of the Crown monopsony[19]) was inconsistent with Treaty principles. It also found the Crown, in breach of the Treaty, failed to ensure the lands reserved for Māori from Crown purchases were sufficient to enable effective iwi participation in the new post-sale colonial economy. Further, the Crown's ongoing acquisition of such reserves, even after they had been set aside for hapū, was in breach of the Treaty. The Tribunal also found that the Crown breached the Treaty and the relevant contractual obligations contained in the purchase deeds in its interpretation and management of a fund established pursuant to those deeds to comprise five per cent of receipts from the on-sale of certain Wairarapa Māori land for the benefit of Māori. Overall, the Tribunal found that the Crown's policies in relation to land purchasing, native land title, and land development were the primary cause of the subsequent and current state of relative landlessness of Wairarapa iwi.

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19 Native Lands Act 1865, s 47.

[27] Although the Tribunal did not refer specifically to the Ngāumu forest (which of course did not exist at the time the land was acquired), these findings related also to the lands underlying what is now Ngāumu forest.[20]

[28] The Tribunal recorded that during the course of hearings, the Crown conceded that its policies and practices in relation to the setting aside and acquisition of native reserves, the administration of the five percent fund and the Crown's role in the resulting landlessness of Wairarapa iwi breached Treaty principles.

Pouākani land findings

[29] The history of the Pouākani land is complex, although, as will become clear, it does fit within the Tribunal's general findings about the Crown's native land acquisition policies and practices outlined above. But first it is necessary to sketch out the Tribunal's Pouākani findings because these demonstrate how it came to be that Wairarapa Māori own Māori freehold land on the banks of the Waikato river, over 400 kilometres from their traditional home.

[30] From the 1850s, land in the vicinity of Lakes Wairarapa and Ōnoke (in southern Wairarapa) was acquired by the Crown for Pākehā settlers, but the lakes themselves and some adjoining land initially remained in Māori ownership. In its natural state, Lake Ōnoke was separated from the sea by a narrow spit for a part of each year. With the spit intact and acting as a natural dam, water levels in the two lakes would rise by up to four metres, transforming them into a single expanse of water (hence "Wairarapa Moana") and increasing the area of land under water from 24,000 to 52,500 acres. According to the Tribunal, this build up of flood waters tended to last for around six months.[21] The pressure of the accumulated water would eventually force a channel in the spit allowing the lakes to drain into Palliser Bay. The actual timing of these events varied according to rainfall and wind direction.[22] But the spit tended to open during the autumn rains and so triggered the eel migration (tuna heke) to the sea. Then, the channel would slowly close up again, setting the scene for the

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20 See generally Wai 863 Report, above n 2, at chs 3A–3D and the maps of Crown purchases and native reserves between 1853–1865 at 129, 154 and 155.

21 Wai 863 Report, above n 2, at 654.

22 *Te Maari v Matthews* (1893) 12 NZLR 13 (CA) at 16.

cycle to repeat. For the Māori owners, the lakes were a very valuable fishery in a general sense, but it was the culmination of this cycle in the tuna heke through the open channel that made the lakes "the single most valuable natural resource in the Wairarapa district".[23]

[31] As the land in the vicinity of the lakes came to be farmed intensively, disputes developed. Some of these disputes related to the delineation of the borders of the lakes (which defined how much land remained in Māori ownership). More significantly for the purposes of this judgment, the settlers wished to maintain a permanent channel to provide drainage from Lake Ōnoke to the sea; this to prevent seasonal inundation of what settlers, by then, saw as their land. The permanent opening of the channel was opposed by Wairarapa Māori because of the adverse impacts it would have on their fishery and other food gathering resources. The associated controversies resulted in petitions to Parliament, a Commission of Inquiry[24] and proceedings before the courts.[25]

[32] In 1883, the Native Land Court awarded title in the lakes to 139 owners belonging to various Rangitāne and Ngāti Kahungunu hapū with customary rights.[26] The legal issue as to the entitlement to drain Lake Ōnoke was settled in 1893, when the Court of Appeal held (by a majority) that under the Public Works Act 1882 and the River Boards Act Amendment Act 1888, the South Wairarapa River Board had delegated power from the Wairarapa South County Council to maintain a permanent channel in the spit.[27] Counsel for the Māori appellants in that case presented a reasonably elaborate argument as to the effect of the Treaty of Waitangi and extant Māori fishing rights on the construction of the relevant empowering legislation. But

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23 Wai 863 Report, above n 2, at 649.

24 A report was presented to the Governor: Alexander Mackay "Claims of Natives to Wairarapa Lakes and Adjacent Lands" [1891] II AJHR G4.

25 See, for example, *Te Maari*, above n 22.

26 See "Claims of Natives to Wairarapa Lakes and Adjacent Lands", above n 24, at 60. See also Wai 863 Report, above n 2, at 653, where the Tribunal identifies the hapū which generally had rights in the area around the lakes as "Ngāi Te Aomataura, Ngāti Te Aokino, Ngāti Pakuahi, Ngāi Tūkoko, Ngāti Te Whakamana, Ngāti Rākaiwhakairi (Rākaiwakairi), Ngāti Komuka, Ngāti Hinetauira, Ngāti Rangitawhanga, Ngāti Te Hangarākau, Ngāi Tūtemiha, and Ngāti Rangiakau". See further Te Whatahoro's evidence to the "Claims of Natives to Wairarapa Lakes and Adjacent Lands"1891 Commission, above n 24, which listed hapū and their respective rangatira that owned land and fishing rights in the lake.

27 *Te Maari*, above n 22.

this aspect of the case was only mentioned briefly in the judgment, which instead focused almost exclusively on the statutory scheme.

[33] In 1896, the Crown and the traditional owners resolved the dispute. Ownership of the lakes and some adjoining land was transferred to the Crown which, in return, paid over a monetary sum, and agreed to make ample reserves for the benefit of the Māori owners. The Māori text of the deed said that the Crown would reserve (rahui tia) suitable land or places (etahi waahi to tika) for the former owners of the lakes for their wellbeing (oranga) in the district or area (tenei takiwa) when land deemed appropriate for the purpose by the Crown came into its ownership.[28] That never happened.[29] Instead, and after a 20-year delay, the Crown agreed to transfer 30,486 acres of (what was, by then) Crown land at Pouākani to the former owners of the lakes or their successors. In 1916, the Native Land Court vested what became the Pouākani No 2 block in 230 Wairarapa Māori. The shareholders of Wairarapa Moana are the descendants of these owners.

[34] The Pouākani land is in the rohe of Raukawa and Ngāti Tūwharetoa. The circumstances in which it had been earlier acquired by the Crown from its Raukawa and Ngāti Tūwharetoa owners are discussed in the 1993 Pouākani Report of the Waitangi Tribunal,[30] and in the judgment of this Court in *Paki v Attorney-General (No 2)*.[31] (For completeness, we note that the Tribunal found those circumstances were also attended by breaches of the Treaty).

[35] In any event, in 1916, when Wairarapa Māori received title, there was no practical access to the 30,486 acres. This only changed in the mid-1940s when the

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28 Wai 863 Report, above n 2, at 667. As recorded by the Waitangi Tribunal, the Māori text for this section of the agreement read (emphasis added):

> … kaati ka ata rahui tia etahi waahi to tika hei oranga mo nga Maori whai tak? ni aua moana i roto i nga whenua e tai mai ana kite ringaringa o? karauna i raro i taua ota whakawhiti a etahi atu whenua maori ranei e tika mai ana ki ti kawanatanga *i roto i tenei takiwa*.

The phrase italicised means "within this district". It is a description of the land the Crown promises to provide under the agreement. The Waitangi Tribunal interpreted this to mean in the environs of the lake. Curiously, there is no equivalent in the English text. These matters are discussed by the Tribunal at 673–675.

29 The Tribunal found that this failure breached the Treaty causing Wairarapa Māori prejudice: at 709–710 and 716–717.

30 Waitangi Tribunal *The Pouakani Report* (Wai 33, 1993).

31 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

Government required a part of Pouākani No 2 block to facilitate construction of the Maraetai dam and a township at Mangakino to house construction workers. Work on this project was carried out from early 1943 for some 55 months before the owners were finally notified in the latter part of 1947, this despite the fact it was located on their land.

[36] In 1949, the Crown compulsorily acquired 787 acres of the larger Pouākani No 2 block for what became the Maraetai Power Station complex. As well, an additional area of 684 acres required for the Mangakino township was compulsorily leased from the owners at a rental set by the Māori Land Court. In its 2010 Report, the Tribunal concluded that the Crown had breached Treaty principles in relation to the original lakes-for-land exchange, the compulsory acquisition of the Pouākani land and the associated Mangakino leases.

[37] The Tribunal recorded the Crown's concessions in relation to Pouākani, offered during the course of hearings, as follows:[32]

> The Crown acknowledges that its accumulated acts and omissions in relation to the Lakes agreement constitute a breach of the Treaty and its principles. It also acknowledges that its failure to inform Māori and discuss the proposed taking of Pouākani prior to the Crown's entry on to the land and the construction of a number of structures on that land constitutes another breach.

Settlement negotiations follow, then stall, then resume again

Negotiations

[38] Once the Tribunal reported on the Wairarapa historical claims, what later became the Ngāti Kahungunu Settlement Trust was established to advance discussions with the Crown over settlement of the Kahungunu-related claims. In November 2012, the Crown accepted the mandate of that Trust to settle the Ngāti Kahungunu ki Wairarapa claims on behalf of all Ngāti Kahungunu claimants.[33] The Crown and the Ngāti Kahungunu Settlement Trust reached an agreement in principle on 7 May 2016 and initialled a formal deed of settlement on 22 March 2018. The deed was then

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32 Wai 863 Report, above n 2, at 1057 (footnote omitted).

33 Rangitāne negotiated and settled separately, ratifying a deed of settlement with the Crown by iwi wide vote in August 2016. Settlement legislation was enacted a year later: Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017.

ratified by vote of the registered beneficiaries of the Trust in a process undertaken between September and November 2018.[34]

[39] The settlement was valued at $93 million and included 70 per cent of Ngāumu Forest (the other 30 per cent had been included in the Rangitāne settlement). No Pouākani land was included by way of relief in the settlement. It was further agreed that the jurisdiction of the Tribunal to consider the extant resumption applications would be removed by legislation.

Resumption applications and preliminary determinations

[40] Meanwhile, Wairarapa Moana had been trying since 2015 to convince the Crown to negotiate with it separately over the Pouākani claim. But the Crown considered the appropriate mandate lay with the Ngāti Kahungunu Settlement Trust, not Wairarapa Moana, and would not engage. On 10 February 2017, Wairarapa Moana applied for resumption of the Pouākani land pursuant to s 8A of the Treaty of Waitangi Act. On 24 March 2018 (two days after the Crown and the Ngāti Kahungunu Settlement Trust initialled the settlement deed), Wairarapa Moana held a special general meeting at which the shareholders in attendance voted down a proposed resolution to withdraw the incorporation's resumption application.[35]

[41] On 30 July 2018, Ms Griggs and Mr Chamberlain applied pursuant to s 8HB of the Treaty of Waitangi Act, for binding recommendations in relation to Ngāumu Forest. They did so on behalf of Ngāi Tūmapūhia-ā-Rangi, a hapū of Ngāti Kahungunu with customary rights in the Ngāumu forest land. There is no suggestion that Ms Griggs and Mr Chamberlain do not speak for the hapū.

[42] In response to these developments, the Crown advised the Ngāti Kahungunu Settlement Trust that it would not finally sign and implement the Deed of Settlement while the resumption applications remained on foot. The Ngāti Kahungunu Settlement Trust, wishing to protect its position, then made what were described as

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[34] There are about 8565 registered beneficiaries of the Ngāti Kahungunu Settlement Trust: Preliminary Determinations, above n 7, at [294]. 33 per cent of beneficiaries voted, and of those, 72 per cent were in favour.

[35] 81.71 per cent of the shareholders' in attendance voted down the proposed resolution.

"defensive" resumption applications mirroring those of Wairarapa Moana and Ngāi Tūmapūhia-ā-Rangi.

[43] The Tribunal commenced hearings in relation to the resumption applications in May 2019 and issued its preliminary determinations in March 2020. As noted, the Tribunal indicated resumption would be a likely outcome of its ongoing iterative process, but appropriate recipients had yet to be identified. These determinations have led to the current judicial review proceedings.

New settlement with Ngāti Kahungunu Settlement Trust

[44] Following delivery of the subsequent High Court decision at the end of March 2021, the Crown and the Ngāti Kahungunu Settlement Trust re-engaged. A new deed of settlement was negotiated. It involved an increase in quantum from $93 million to $115 million and the offer of a further $5 million for enhancement of the lakes environment. The deed was ratified by Settlement Trust beneficiaries in a vote.[36] The position with respect to the Pouākani land and Ngāumu forest remained unchanged. The deed purports to settle all claims of Ngāti Kahungunu ki Wairarapa, including those of Wairarapa Moana and Ngāi Tūmapūhia-ā-Rangi, and accepts that the Tribunal's jurisdiction to entertain the resumption applications will be removed. Relevant Ministers and trustees signed the new deed on 29 October 2021.[37]

Claim settlement Bill

[45] Ratifying settlement legislation was introduced in the House on 4 February 2022. The legislation, if enacted would put an end to these proceedings. In light of this we address two issues for the purposes of clarification only.

[46] The first is this. At an earlier stage in this process, Mercury submitted in opposition to Wairarapa Moana's application for leave to appeal directly to this Court,

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[36] 31 per cent of the Ngāti Kahungunu Settlement Trust members voted, with 68 per cent in favour of the settlement; see Waitangi Tribunal *Decision on Application for an Urgent Hearing* (Wai 3058 and Wai 429, October 2021) at [12(h)]. The Waitangi Tribunal found that this "ratification" was not, in fact, sufficient ratification: Waitangi Tribunal *Decision of the Tribunal* (Wai 3058, Wai 429 and Wai 3068, November 2021) at [148]. This is, of course, not before us.

[37] The Waitangi Tribunal found that the Settlement Trust had no mandate for the claimants in Wai 429 (Ngāi Tūmapūhia-ā-Rangi) and Wai 3058/85 (Wairarapa Moana): *Decision of the Tribunal*, above n 36. This is also not before us.

that the application itself demonstrated this proceeding was, in substance, an attempt to interfere inappropriately in Parliamentary proceedings. We disagreed. Elias CJ's discussion in *Ngāti Whātua Ōrākei Trust v Attorney-General* of the 1976 decision of Beattie J in *Fitzgerald v Muldoon*, demonstrates why.[38] As Elias CJ noted, the plaintiff sought injunctions and mandamus against the Prime Minister whose purported suspension of payments to the New Zealand superannuation fund was argued to be unlawful. An application for priority fixture was made to ensure the matter could be heard before Parliament's next sitting. The Crown opposed on the basis that retrospective legislation would be introduced into the House to deal with the issue. The Crown argued that the plaintiff was simply trying to "beat Parliament to the draw".[39] Beattie J granted the priority fixture. He considered that the proceedings were brought to require the Prime Minister to comply with existing legislation. The plaintiff was entitled to have his case heard with expedition. After discussing that decision, Elias CJ said this:

> [119] I do not think the circumstance that the plaintiff in *Fitzgerald v Muldoon* sought to uphold statutory obligations is reason not to apply the same approach. Until Parliament changes the law, the courts must be open to citizens who seek to have their existing legal interests and rights determined. The rights recognised in s 27 of the New Zealand Bill of Rights Act 1990 to natural justice and to bring proceedings against the Crown on equal terms would not otherwise be fulfilled. Parliamentary freedom of debate and in its proceedings is unaffected by the judicial responsibility to hear and determine rights and interests protected by law.

[47] Second, these appeals do not put the claims settlement Bill in issue in any way. Rather, they raise orthodox claims of statutory or other right: the right to have extant applications for resumption determined according to law, and the related right to test the implications of tikanga considerations in that context. They therefore involve no conflict with the terms of s 11 of the Parliamentary Privilege Act 2014, nor any breach of the common law principle of non-interference.[40] A passage from the Court of Appeal decision in *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v*

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38 See *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [117]–[118] per Elias CJ.

39 At [117] referring to the comments of Beattie J in *Fitzgerald v Muldoon* SC Wellington A118/76, 19 May 1976 at 3.

40 See *Ngāti Whātua Ōrākei Trust*, above n 38, at [46]; and *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1 at [33]–[35]. See also *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 WLR 213 (CCA) at 215–216. Note also *Fitzgerald v Muldoon*, above n 39.

Attorney-General, delivered sometime after this Court's decision in *Ngāti Whātua Ōrākei Trust*, captures the essential points:[41]

> [33] ... the reasoning of both the majority and Elias CJ in *Ngāti Whātua* is consistent with the proposition that the courts may make declarations of existing right, interest or entitlement whether or not there is a bill before the House which may affect them in some way. Such relief is not "in relation to parliamentary proceedings", in the sense provided for by ... the Parliamentary Privilege Act. It does not amount to an interference by the courts in Parliament's "proper sphere of influence and privileges" because such declarations would be about existing rights, interests or entitlements, and not what Parliament may be proposing to do in relation to them. The terms of s 4(1)(b) of the Parliamentary Privilege Act are apposite here. Comity is a principle of "*mutual* respect and restraint" between the legislative and judicial branches as to their respective constitutional functions. It is the function of courts to adjudicate on rights and entitlements.
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> [34] In very different circumstances, the English courts have adopted a similar approach. For example, in *Willow Wren Canal Carrying Co Ltd v British Transport Commission*, the English High Court refused to stay a proceeding commenced by a canal barge company against the canal owner, despite the fact that there was a bill before the House relieving the owner of the very duties upon which the plaintiff based its suit. The canal owner argued that even if the injunction sought were granted, the Judge would be required to suspend it until the legislative process had taken its course. Upjohn J said this:
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> > A preliminary objection is taken to [the defendant's application for stay], which is fatal to that application; and it is that, sitting in this court, it is my duty to see that litigants have their cases tried, as they are entitled to, and that I cannot take into account the possible effect of some Bill now before Parliament which, if passed into law in its present form, may have some effect upon the rights of the parties. That seems to me to be a correct formulation of the law. This court is not concerned with what Parliament may think it wise to do in relation to the rights of parties, but the plaintiffs are entitled to come to this court and say, "In the normal course of events our action will very soon be ripe for hearing. We desire that the court should hear it."
> >
> > Of course, if subsequently to that Parliament in its wisdom by some enactment affects the rights of the parties even to the extent of modifying or abrogating the effects of any judgment which the plaintiffs may be fortunate enough to obtain, no one doubts the right and power of Parliament to do so. But it is plain that it is not right for this court either now or at the hearing to take into account the possible effect of some Bill at present before Parliament which, so far as this Court is concerned, may never be passed into law at all, or, if passed into law, may ultimately contain provisions which do not affect the rights of the parties before the court at all. In other words, it is a matter of speculation on which this court will not embark as to whether a Bill at present before Parliament will be passed into law in its present form.
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> [35] The Judge went on to note that "[a]uthority is not wanting for that proposition".

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41 *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd*, above n 40 (footnotes omitted).

The Waitangi Tribunal's preliminary determinations

[48] We return now to address the Tribunal's substantive preliminary determinations of 24 March 2020 in a little more detail and with particular reference to the issues arising in these appeals.

[49] Between May and December 2019, the Tribunal heard evidence and submissions in what it described as an iterative process for determining whether to recommend the return of the Pouākani and Ngāumu forest land. The Tribunal explained what it meant by this:[42]

> Google informs us that an iterative process is one that 'should come closer to the desired result as the number of iterations increases'. The term is usually used in a mathematical context, but we can usefully borrow it to describe a means of allowing interactions between parties and the tribunal about the tribunal's proposals for the implementation of its binding recommendations to arrive at an ultimate result that is not only legal/tika but also understood, accepted, and practical.

[50] Incorporated in this is the idea that as the process continues, some possible outcomes fall away so as to provide scope for greater focus on those that remain.

[51] Importantly, for the issues arising in this appeal, the Tribunal determined that the prejudice suffered by Ngāti Kahungunu ki Wairarapa as a result of the Crown's Treaty breaches justified the making of binding recommendations in relation both to the Pouākani land and the Ngāumu forest land.[43]

Pouākani land determinations

[52] In relation to the Pouākani land specifically:

(a) The Tribunal considered that Treaty breaches in relation to the subject land were not sufficient to justify resumption of land and fixtures worth more than $600 million. But, in the Tribunal's view, it was also entitled to factor into its assessment two additional sources of Treaty prejudice: first, the prejudice arising from the Crown's acquisition of

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42 Waitangi Tribunal *Memorandum-Directions Setting Out Matters That Parties Should Take Into Account In Preparing Closing Submissions* (Wai 863, 29 August 2019) at [41].

43 Preliminary Determinations, above n 7, at [122]–[123] and [215].

Wairarapa Moana, and second, the wider tribal narrative of dispossession and landlessness affecting all Ngāti Kahungunu ki Wairarapa, whether or not it related to Pouākani or the lakes. On this broader approach, resumption was proportionate to the prejudice.[44]

(b) The Tribunal felt that the scheme of s 8A of the Treaty of Waitangi Act mandated this approach. In particular, the requirements of s 8A(2) could be satisfied because the wider Ngāti Kahungunu ki Wairarapa claims of Crown driven landlessness did relate "in whole or in part" to the Pouākani land,[45] and vesting such land in a tribally mandated body did involve "return [of the land] to Maori ownership" as required by that section.[46] Further, the Treaty context required the Tribunal to construe the statutory language in a "broad and unquibbling" way, while the negotiated background to the enactment suggested a "looser construction" was appropriate.[47]

(c) Since, the Tribunal then considered, the justification for resumption includes losses on a tribal scale, the appropriate recipient should carry a tribal mandate. Wairarapa Moana shareholders, by contrast, had only "private rights".[48] Further, their shares were unequal. For both reasons, Wairarapa Moana shares ought not to form the basis for Treaty-based compensation.[49] It followed that Wairarapa Moana was not an appropriate recipient.[50]

(d) Finally, the fact that Raukawa and Ngāti Tūwharetoa held mana whenua over the Pouākani land did not, in the Tribunal's view, preclude a recommendation for resumption in favour of Ngāti Kahungunu.[51] There were other relevant tikanga that favoured resumption including

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44 At [278].
45 At [122].
46 At [266].
47 At [121], referring to *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) at 518.
48 Preliminary Determinations, above n 7, at [278].
49 At [278]–[279].
50 At [282].
51 At [259].

> hara, muru, utu and ea. Instead, judgement fell to be exercised in a "tikanga-compromised world" in which the best had to be made of the sui generis circumstances of this case.[52] Relevant factors included that the Tribunal could not recommend resumption to mana whenua iwi — all of whose claims had already been settled — and that Ngāti Kahungunu had no option 100 years ago but to take the land on offer.[53]

Ngāumu forest determinations

[53] In relation to the Ngāumu forest land, the preliminary determinations addressed two discrete issues: the appropriateness of awarding the land to a hapū, rather than the wider iwi (albeit, a hapū with primary rights in the land); and the appropriate approach to calculating the interest component of monetary compensation that must accompany resumption of Crown forest land.

[54] On the hapū recipient question, the Tribunal took a similar approach to that taken in relation to Pouākani. First, the wider Ngāti Kahungunu claims did "relate to" Ngāumu forest in a general sense.[54] Second, the Tribunal accepted that returning the land to Ngāi Tūmapūhia-ā-Rangi might be proportionate, but since any return would also, and automatically, involve the payment of significant monetary compensation, this would only be proportionate if the recipient represented those who had been subjected to Treaty-based prejudice on a wider scale.[55] The Tribunal noted, in any event, that other hapū also had interests in Ngāumu forest.[56]

[55] As to the calculation of interest, the question was when the Crown became liable to pay interest on compensation payable under the Crown Forest Assets Act. That Act (which we discuss in detail below) provides a minimum four-year interest holiday from the date on which the relevant claim was filed.[57] In the case of the Ngāumu forest, that four-year period ended in October 1992. The interest holiday

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52 At [261].
53 At [237]–[243] and [259]–[261].
54 At [115].
55 At [283].
56 At [287]. Other primary interests are with Ngāti Hinewaka and Te Hika o Pāpāuma.
57 Crown Forest Assets Act, sch 1 cls 5–6.

may, however, be extended if delay in resolving the claim was not within the Crown's control. The Tribunal found that delay in relation to return of the Ngāumu forest (30 years) was attributable entirely to the Crown. Its reasons were put in the following terms:[58]

> 306. The Crown made no suggestion of claimant delay. However, it submitted it was prevented, by reasons beyond its control, from carrying out some of its obligations under the Forestry Agreement. One obligation is to use 'best endeavours' to enable the Waitangi Tribunal to identify and process all claims, and participate in relevant Tribunal processes concerning the licensed lands. Here, the Crown submitted it has done its best but the scheduling of the Tribunal's work and interruptions caused by ongoing litigation have been beyond its control.
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> 307. For this reason, the Crown argued that the Tribunal should extend the four-year period when determining how compensation should be calculated, and said there are 'no grounds to penalise the Crown for the time the litigation has taken.'
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> 308. The Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua Settlement Trust countered this, saying:
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> > 386. In fact, the Crown has taken steps to frustrate claimants' ability to have their claims processes within the shortest reasonable period. Mr Fraser agreed that generally the Crown will not continue to negotiate with groups where they begin to litigate against the Crown, including through bringing resumption applications.
> >
> > 387. It is apparent that the Crown made a policy decision to push claimants toward negotiated resolution of claims. That was the Crown's choice. It was in a way the Crown's gamble: that it could negotiate settlements before a successful resumption application. The compensation has become substantial in the time since, but the Crown would have been aware of that.
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> 309. We agree with these submissions. The Crown has been in charge of the whole Treaty settlement process. In a number of cases, it has settled with parties without waiting for the Tribunal to conduct an inquiry. Moreover, the funding of the Tribunal was in the Crown's hands. Had the Crown wanted the inquiry process to go faster, it could have resourced the Tribunal accordingly. Therefore, we do not accept that there were reasons beyond the Crown's control that led to delay.
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> 310. We find that the reasons for extending the four-year period in clause 6 do not apply here. The effect of this decision is for the higher interest rate prescribed in clause 5((b) to commence from 28 October 1992 – four years after 28 October 1988, when the claim was filed.

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58 Preliminary Determinations, above n 7 (footnotes omitted).

The status of these 'preliminary' determinations

[56] The Tribunal concluded its preliminary determinations by making two potentially significant points. First, that there were further determinations to be made before the terms of any formal interim recommendations could be finalised. And second, that the determinations it had made were not necessarily final either:[59]

> This preliminary determination by no means disposes of all the important matters we must decide, however. Nor would we say it is necessarily final. It expresses our formed views on key aspects of the exercise of discretion in section 8A and 8HB, but it remains possible that we may decide that nevertheless we should not make interim recommendations in the form we currently intend.

[57] Further submissions would be sought in due course on a number of matters including the appropriate recipient entity on behalf of Ngāti Kahungunu ki Wairarapa for the Pouākani land and the Ngāumu forest land,[60] and the compensation issues arising from sch 1 of the Crown Forests Assets Act in relation to the Ngāumu forest land.[61]

Issue one: the mootness issue

[58] For the Crown, Mr Heron KC argued that the Tribunal had already rejected Wairarapa Moana's application on its merits and determined that return of the land would be disproportionate to the incorporation's claims and the prejudice it suffered. That meant that Wairarapa Moana's appeal was effectively moot.

[59] We do not agree for three reasons. First, the Tribunal was clear that all of its determinations were preliminary and subject to review should the circumstances require.[62] Second, the legislation does not actually require an application.[63] Third, and perhaps most importantly, the High Court's view was that the Tribunal impermissibly broadened the scope of qualifying Treaty prejudice. That finding has

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59 At [316].
60 The Tribunal indicated that this could be the Ngāti Kahungunu Settlement Trust: Preliminary Determinations, above n 7, at [295]–[296].
61 At [316].
62 See above at [56]–[57].
63 *Haronga*, above n 17, at [137(a)] per William Young J.

not been appealed.[64] Relevant prejudice is now somewhat more restricted in scope to the loss of the Wairarapa lakes, the Pouākani land swap and the compulsory acquisition of the Maraetai development site. On any view, this is a fundamentally different basis for decision than the iwi-wide approach preferred by the Tribunal. The Tribunal has not yet considered whether, despite its earlier view, resumption might still be a proportionate response to this somewhat narrower class of prejudice. Nor has it considered the downstream question of which group would best represent the descendants of those who suffered that more-specific prejudice. The Tribunal is bound therefore to consider the applications afresh. The application therefore remains on foot.

Issue two: the mana whenua issue

The High Court's approach

[60] The starting point in the High Court's view, is that the Tribunal is bound by tikanga and Treaty principles. The effect is that mana whenua will be fundamentally important in resumption applications. This, in turn means, firstly, that the resumption power exists primarily as a remedy for the Treaty-breaching loss of mana whenua over the land in question:[65]

> The essence of the resumption jurisdiction is specific, and focuses on the Treaty breach associated with the loss of the mana whenua over the land in question, and the appropriateness of return of the land given that breach.

A second implication is that, even if non-mana whenua claimants are technically eligible to obtain resumption, they are unlikely to succeed if mana whenua is held by another iwi:[66]

> In accordance with my findings on the first ground of challenge [the meaning of "relates … to" in s 8A], the fact that Ngāti Kahungunu has no mana whenua

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64 We are not to be taken as necessarily accepting that this narrowing is the correct approach: see our discussion below at [98]–[100].

65 HC judgment, above n 8, at [88].

66 At [118] (footnote omitted). While not strictly relevant, the second conclusion tends to suggest the High Court may have been operating under a misunderstanding of the true position. It seems to imply that there is land in New Zealand not subject to the mana whenua of an iwi or hapū. This land, in the High Court's view, could be eligible for resumption by non-mana whenua. This suggestion proceeds on a false premise. There is no land in New Zealand in respect of which there is not at least one iwi or hapū that claims mana whenua over it. There are many areas where multiple iwi or hapū claim mana whenua: see Elizabeth Toomey (ed) *New Zealand Land Law*

> over the land is very significant, but not fatal to the claim for resumption. But the fact that other iwi have mana whenua over that land will likely be.

[61] In relation to the Pouākani land specifically, the High Court therefore concluded that:[67]

> Directing the land be transferred to an iwi that has no mana whenua in the land conflicts with the rights of the iwi that do, and this is inconsistent with tikanga and the principles of the Treaty.

The positions of the parties

[62] Wairarapa Moana's challenge to the judgment of High Court is twofold:

(a) it maintains that "return to Maori ownership" in s 8A is not confined to the return of land to mana whenua iwi only; and

(b) it says the Tribunal's approach to tikanga was correct and the High Court's approach was both wrong and an usurpation of the Tribunal's function.

[63] Wairarapa Moana did not engage with the wider "land bank" issues dealt with by the High Court; this no doubt on the basis that, however viewed, its claims of prejudice in relation to loss of the Pouākani land are unquestionably specific to that land.

[64] The Crown's position is that:

(a) The High Court was correct to say that mana whenua was a highly relevant consideration for the Tribunal in determining a resumption application; and

(b) tikanga was at least a very weighty consideration, and rightly so regarded by the High Court; and the Judge had not substituted his view of tikanga for that of the Tribunal.

(5th ed, Thomson Reuters, Wellington, 2017) at 4 and 443–445; and Richard Boast and others *Maori Land Law* (Butterworths, Wellington, 1999) at 48–49.

67 HC judgment, above n 8, at [147(d)].

[65] Raukawa maintains that the expressions "resumption" and "return to Maori" in s 8A mean resumption is only available to claimants with a mana whenua connection to the land. It also argues that the Tribunal may not act inconsistently with tikanga and that "return of the land" to Ngāti Kahungunu or Wairarapa Moana would be inconsistent with both tikanga and the principles of the Treaty, and in particular, the Crown's obligations to Raukawa and Ngāti Tūwharetoa.

[66] Mercury takes broadly the same approach as the Crown and generally supports the approach taken by the High Court. It argues that "return to Maori ownership" is confined to return to the group who hold rangatiratanga and mana whenua over the land to be resumed (and to this extent, disagreed with the view of the High Court that, on the statutory language, the land is eligible to be considered for return). It supports the approach of the High Court in relation to mana whenua and its conclusion that return of the land to Ngāti Kahungunu would breach tikanga and the principles of the Treaty.

[67] Ngāi Tūmapūhia-ā-Rangi, for whom this issue is also of some relevance, supports the approach of the High Court. More particularly, its position is that it is not open to the Tribunal to recommend resumption of land taken from one claimant to meet the claims of other claimants in respect of different losses. It also broadly supported the approach of the High Court that the Tribunal must comply with tikanga and may not make decisions which, if implemented, would breach the principles of the Treaty, although it did note that it is open to question whether the Judge was right as to what this meant in relation to the resumption of the Pouākani land.

[68] The Ngāti Kahungunu Settlement Trust appeared but, as we presaged, made no submissions.

Setting mana whenua in the wider context of tikanga and its evolution

[69] As we come to in relation to issue three, the High Court accepted that, in the particular circumstances of this claim, the history of the acquisition of the Wairarapa lakes and the land exchange also "related to" the Pouākani land for the purposes of

s 8A.[68] In other words, the relevant prejudice for resumption purposes was not just the compulsory acquisition in 1949. This finding might still have provided real support for the resumption applications by Ngāti Kahungunu interests, but the Court's further finding on the priority of mana whenua meant the lakes context was likely to count for little in the end. This is because, the (almost) insurmountable difficulty confronting the Ngāti Kahungunu applications was that tikanga and Treaty principles bind the Tribunal in the exercise of all its functions.[69] It followed that a recommendation, against opposition from mana whenua, that land be returned to non-mana whenua iwi or hapū would breach both the Treaty and tikanga and therefore "likely" be "fatal".[70]

[70] Applying these principles to this case, the High Court held that the Tribunal had unlawfully sacrificed mana whenua to promote other (non-tikanga) considerations it felt were more compelling: the historical Treaty breaches borne by Wairarapa Moana, the hapū of the Wairarapa lakes and wider Ngāti Kahungunu in relation to their Wairarapa lands.[71]

[71] There was, to be fair, a deal of evidence before the Tribunal and the High Court in relation to the pre-existing mana whenua of the iwi who owned the Pouākani land before the Crown acquired and transferred it to Wairarapa Moana. In the Tribunal, Raukawa relied on the tikanga evidence of Paraone Gloyne and Nigel Te Hiko. Mr Gloyne referred to a haka he wrote in 2016 protesting at the continued insult of an outside iwi having land and a marae within Raukawa rohe. He resented the fact that Wairarapa Moana obtained the Pouākani lands by the pen not the patu. Mr Te Hiko identified the historic sources of Raukawa mana whenua and acknowledged that the mana whenua of his iwi is, in places, shared with Ngāti Tūwharetoa. But he rejected suggestions by Wairarapa Moana witnesses that intermarriages between Ngāti Kahungunu and Raukawa created a kind of substitute mana whenua in favour of Wairarapa Moana.

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68 See below at [97].
69 HC judgment, above n 8, at [102] and [104].
70 At [116]–[118].
71 See [91]–[94], [107]–[108] and [117].

[72] In the High Court, Raukawa filed affidavits by Professor Jacinta Ruru and Ms Mihiata Pirini (jointly) and by Sir Tipene O'Regan. Professor Ruru and Ms Pirini are legal academics with particular expertise in indigenous rights law. They considered that, contrary to the view expressed by the Tribunal,[72] there is no such thing as a tikanga-compromised world in which tikanga's requirements may be passed over. Tikanga must be applied fully and in accordance with its terms. Sir Tipene O'Regan also rejected any suggestion that the shareholders of Wairarapa Moana might, over time, have obtained mana whenua or tikanga-based rights in Pouākani. But he fairly, with respect, acknowledged that the situation faced by Raukawa and Wairarapa Moana is akin to that of non-tribal urban marae in the South Island: accommodations are reached, and must be reached, and a modus vivendi eventually found.

[73] We accept that Parliament cannot have intended that the Tribunal be empowered to breach the principles of the Treaty. It follows that tikanga will, at the least, be a very important consideration in the exercise of the Tribunal's discretion. Further, we readily acknowledge the concerns expressed by tikanga practitioners and legal experts about the need to protect tikanga generally, and particularly mana whenua, when it must interact with State law, especially that related to Treaty settlements. And we completely understand why unconditional return of the Pouākani land to Wairarapa Moana would be seen by Raukawa as compounding their historical grievances in relation to that land.[73]

[74] All that said, we take the view that in tikanga, as in law, context is everything. It is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context. The following four factors suggest to us that in this

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72 See Preliminary Determinations, above n 7, at [261].

73 See Raukawa Claims Settlement Act 2014, ss 8(9) and 9(11).

case, a rigid approach to the priority of mana whenua (if that is what the Judge intended in the second conclusion cited above at [60]) cannot be justified.[74]

[75] First, mana whenua refers to traditional authority (mana) over a landscape (whenua). It is the right to speak for the land and for the people of it.[75] There is no doubt that mana whenua is a very important principle of tikanga, not lightly to be overridden.[76] Wairarapa Moana quite properly accepted this in submissions before us. So we agree with the view expressed by William Young J that the paradigm resumption candidate is one involving return of land to its former customary owners.[77] But customary ownership and mana whenua are not necessarily synonymous. There are in fact many examples where mana whenua was held by one community and resource rights within the same area were held by another.[78] But setting that point to one side, it does not follow that the paradigm case is the only path to resumption. The text and

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74 We note in that respect that despite the apparently firm conclusions expressed at [117]–[118] of the HC judgment, above n 8, the Judge did make the following comment earlier in the judgment at [89] (footnote omitted):

> I should make it clear that, whilst I have concluded that restoring full mana whenua over land is a key purpose of the provisions, I also conclude the lands at Pouākani are technically eligible to be considered under s 8A. Although this was the purpose of the provisions, and whilst Ngāti Kahungunu have no mana whenua over these lands, the claims nevertheless qualify for consideration as a matter of plain wording. The land was previously in Māori ownership and accordingly can be "returned". There is a qualifying claim concerning the circumstances under which the Crown took title from the Māori landowners. But it seems to me that the lack of mana whenua is a very important consideration when the exercise of the power is considered.

75 See *Kamo v Minister of Conservation* [2020] NZCA 1, [2020] 2 NZLR 746 at [29]. For a discussion of the different conceptions of mana whenua see Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 178.

76 Although, there is a school of thought that mana whenua was a 19th century adaptation rendered necessary by the introduction in 1840 of the common law's distinction between imperium and dominium: see discussion in *Te Mātāpunenga* about mana whenua, above n 75, at 187–204; and in Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wai 64, 2001) at 28–29. There may well be some merit in that view. If correct, it serves to confirm that tikanga is no more static than any other system of law. It is certainly the position that as *take tipuna*, or ancestral right-based 'titles' held by hapū communities, were progressively extinguished, the importance in tikanga terms of the authority-centred mana whenua held by supervening iwi collectives became more important.

77 See William Young J's reasons below at [173].

78 For example, Ngāti Hauā at Tauranga (see Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at 40–41) and Tūhoe at Ōhiwa Harbour (see Waitangi Tribunal *The Ngati Awa Raupatu Report* (Wai 46, 1999) at 134–135 and 148). See also the general discussion in *Te Mātāpunenga*, above n 75, at 199–204 and the discussion in Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2018) at 53–54.

principles of the Treaty do not refer only to customary rights and their restoration. They also refer, for example, to the protection of equal rights.

[76] Second, even within its own tikanga framework, mana whenua is neither immutable nor incapable of adaptation to new circumstances. Every system of law recognises that core principles, applied to real life, will have exceptions and adaptations. Indeed, as the mātanga (experts) noted in the course of the tikanga wānanga held by the Tribunal prior to completion of its preliminary report, tikanga is a principles-based system of law that is highly sensitive to context and sceptical of unbending rules.[79] This is not a matter of compromising tikanga, but of *applying* it to context.

[77] Relatedly, the Tribunal did not refuse to apply tikanga in its assessment.[80] Rather, it concluded that mana whenua need not be the controlling tikanga because other tikanga principles were also in play. These included principles such as hara, utu, ea and mana. Taken together, they reflect the importance of acknowledging wrongdoing and restoring balance in a way that affirms mana.[81] We come back to this last aspect below when we discuss tikanga-based processes.

[78] Third, throughout the colonial period and during the current period of Treaty settlements, tikanga has adapted to new circumstances — sometimes willingly and sometimes out of reluctant necessity. In the colonial period, hapū engaged in pre-1840 land transactions with early settlers across what may be described as a cultural and legal divide;[82] from 1840 to 1865, accommodations between multiple hapū and iwi were brokered to facilitate Crown purchases and attract settlers;[83] and after 1865, multiple hapū co-ordinated their efforts and resolved their disputes outside the Native Land Court before asking the Court to affirm their agreements through

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79 See discussion in Waitangi Tribunal *Tikanga of redress transcript* (Wai 863, 2019).

80 If that is what the High Court suggests (see HC judgment, above n 8, at [108]), then it is wrong.

81 Preliminary Determinations, above n 7, at [237]:

> There must be delivery from the historical hara (transgressions, violations) that Ngāti Kahungunu ki Wairarapa Tāmaki nui-Ā-Rua have suffered from Crown policies and actions through the decades. We must do our best to exercise our discretion in sections 8A and 8HB to assist the claimants to find ea. Ea incorporates elements of restored relationships and balance (whanaungatanga), or reciprocity and payment for harm (utu), of recognising and restoring Māori authority and prestige (mana), all in accordance with what is tika (appropriate and correct) and affirming tapu (protection).

82 See Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at ch 3.

83 See Waitangi Tribunal *The Mohaka ki Ahuriri Report* (Wai 201, 2004) at chs 4–5.

consent awards.[84] Tikanga consistently framed Māori responses to these wholly novel situations.

[79] In contemporary times, the West Auckland-based Te Whānau o Waipareira Trust brought a claim to the Waitangi Tribunal in the 1990s arguing that urban Māori collectives now enjoyed certain Article Two Treaty rights. Notable for the fact that Professor Sir Hugh Kawharu of Ngāti Whātua Ōrākei was a senior member of that Tribunal panel, the claim was upheld.[85] Around the same time, contestation over the allocation of Māori commercial fishing quota raised unique debates about whether distribution should be based on iwi coastline (mana moana) or population (mana tangata), and (separately) whether urban Māori collectives such as Waipareira, among others, had their own rights to quota. These were difficult and controversial issues for Te Ao Māori to work through, but in the litigation and negotiations that ensued, recourse was had to tikanga as an adaptable framework for resolution.[86]

[80] The current controversy over the land at Pouākani might be viewed as a continuation of this ongoing process of adaptation.

[81] Fourth, the transfer of land from mana whenua to non-mana whenua is well known to tikanga. 'Tuku whenua' (the term for such transfers) were traditionally made to compensate for serious wrongdoing, acknowledge a significant benefit or service, cement an important alliance, incorporate the donee into the host community, or just for aroha.[87]

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84 See, for example, Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006) at 696; and Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 450–451.

85 Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998).

86 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (CA); and Māori Fisheries Act 2004.

87 *Te Mātāpunenga*, above n 75, at 441–447; Norman Smith *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 102–106; and *Muriwhenua Land Report*, above n 82, at 24–25.

[82] But the Pouākani case is almost unprecedented. The Tribunal was required to apply tikanga to a situation that would never arise in a purely tikanga world. That is because:

(a) Wairarapa Moana were allocated former Crown land they (originally) did not want, precisely because they had no mana whenua there;[88]

(b) Raukawa and Ngāti Tūwharetoa hapū did not own the land at the time — the Crown had already acquired it through purchase and in lieu of unpaid survey liens — and they have now settled all of their Treaty claims including those relating to Pouākani;[89] and

(c) the "well founded claim" for which compensation is sought by Wairarapa Moana was not based on a hara perpetrated by mana whenua (as might have been the case in a tuku whenua), but by the Crown in acquiring the land from mana whenua and then on-transferring it.

An additional factor perhaps, is that a resumption application is the only procedure by which Ngāti Kahungunu (however configured) can seek to obtain redress that does not rely on Crown consent and ratifying legislation.[90]

[83] All things considered, and as many tikanga practitioners would no doubt acknowledge, this resumption application raises difficult problems needing to be approached with care because there are multiple Crown Treaty breaches and competing tikanga principles affecting both sets of Māori interests. Tikanga practitioners might also acknowledge that a tikanga-consistent response would require consideration of multiple factors. And they would certainly know that resolution requires a good deal more kōrero between the protagonists.

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88 Ngāti Kahungunu ki Wairarapa had wanted exchange land in Wairarapa: Wai 863 Report, above n 2, at 677.

89 Pouakani Claims Settlement Act; Raukawa Claims Settlement Act; and Ngāti Tūwharetoa Claims Settlement Act 2018.

90 A point also made in *Haronga*, above n 17, at [76] per Elias CJ, Blanchard, Tipping and McGrath JJ in relation to Crown forests.

[84] To sum up to this point, we agree with the High Court Judge's view that mana whenua is a very important principle of tikanga entitled to be treated with great respect by the Tribunal in its work. But, as noted, there are other principles of tikanga too, and sometimes context may require mana whenua to give way, in whole or in part. Unlike the High Court, we do not consider this to be a bright line, black and white case. It too inhabits the grey area between cultural and legal worlds, requiring understanding and the ability to comprehend nuance. The Tribunal is uniquely placed to undertake that evaluation because its members include mātanga and because it is required to deal with these matters regularly. As the High Court Judge acknowledged, it has the necessary expertise.[91] In addition, it has worked with Ngāti Kahungunu communities, including the Wairarapa lakes hapū, for 15 years and knows its people and internal structures well. And it knows the Raukawa and Ngāti Tūwharetoa communities from whom it has heard evidence and received submissions.

[85] By positing the counterfactual of mana whenua support for resumption, William Young J argues the High Court cannot have meant that granting resumption to non-mana whenua will always breach tikanga and the Treaty. On our view, an error in the High Court judgment is that it plainly does mean that. Further, as we say at [11](b), [84] and below at [160], mana whenua is not the only relevant tikanga principle in play, and in any event, its potency will be context driven. In the Tribunal's iterative process, context will evolve. The courts must not pre-empt that. And they most certainly must not do so, in reliance on an incomplete understanding of tikanga in relation to whenua.

Engaging tikanga processes to resolve resumption applications

[86] The Tribunal well knows that tikanga is as much about right or tika processes as it is about tika outcomes, and that *whaka-ea* (the restoration of balance between disputants) is best achieved through tika processes.[92]

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91 HC judgment, above n 8, at [109].

92 Preliminary Determinations, above n 7, at [237]–[243]. See also the discussion in *Ellis v R* [2022] NZSC 114 at [253]–[256] per Williams J; see also [124]–[125] per Glazebrook J; and *Tikanga of redress transcript*, above n 79, at 22.

[87] The Treaty of Waitangi Act gives the Tribunal the flexibility to pursue tika process. Section 6(3) requires the Tribunal to have regard to "all the circumstances" of the case when deciding whether to make a recommendation to the Crown, and any such recommendation may be on general or specific terms.[93] Similarly under s 8A(2), any recommendation for return of former State enterprise land may be on "such terms and conditions as the Tribunal considers appropriate". Further, as noted, the Tribunal may regulate its procedure "as it sees fit" and may "have regard to and adopt such aspects of "te kawa o te marae" as it thinks appropriate to the case.[94]

[88] Raukawa, Ngāti Tūwharetoa and Wairarapa Moana all share two things in common. They have suffered wrongs in relation to Pouākani, and they will always be neighbours. This important reality was not lost on at least some of the protagonists in this case. Sir Tipene O'Regan (who has had some experience in these matters) noted in his affidavit on behalf of Raukawa:

> In my experience, like it or not, others are often placed in your rohe and all parties must learn to adapt and negotiate an agreed process. In my view this is a form of behaviour that is consistent with both tikaka [tikanga] and 'Kaupapa Tiriti' – the Principles of the Treaty.

[89] The Tribunal is engaged in an iterative process. Its options are not necessarily binary. It could, when the time is right, require mana whenua and relevant Ngāti Kahungunu interests, whether configured tribally or on a narrower basis, to seek whaka-ea through tika processes.

[90] For Raukawa, Mr Finlayson KC, accepted that such approach is at least theoretically possible. He cautioned though that to date, in Wairarapa Moana's case, its leadership had been reluctant to engage constructively. But the Ngāti Kahungunu Settlement Trust told the Tribunal it would work with Raukawa, recognising Raukawa's mana whenua at Pouākani and Wairarapa Moana's position may change.

[91] Of course, we must not be taken to be expressing any view at all as to whether this, or any other course, is appropriate in this case. And, if tikanga-based processes are pursued, it will be for the Tribunal alone to decide how any outcome may affect

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93 Treaty of Waitangi Act, s 6(4).
94 Schedule 2 cl 5(9)

the relevant application. We seek only to underscore the flexibility that is built into the resumption regime and to note that there is room for the utilisation of tikanga processes to promote outcomes that avoid the double injury risk that understandably troubles Raukawa so deeply.[95]

Mana whenua and the Ngāumu forest

[92] The High Court's discussion of resumption did not focus on the Ngāumu forest. Rather, the focus in the Ngāumu forest appeal was on the Tribunal's approach to the calculation of compensation under s 36 and sch 1 of the Crown Forest Assets Act. But mana whenua is still an issue.

[93] Ngāti Kahungunu and Ngāi Tūmapūhia-ā-Rangi both, in a sense, have traditional or customary interests in the Ngāumu forest. Ngāti Kahungunu is the iwi with overarching mana whenua in the district and Ngāi Tūmapūhia-ā-Rangi is the hapū with direct customary rights (*take tipuna*)[96] in at least part of the forest land.

[94] For present purposes, we simply note that the contest between wider Ngāti Kahungunu and Ngāi Tūmapūhia-ā-Rangi in relation to Ngāumu forest raises somewhat similar nexus issues to those in Pouākani. They are, admittedly, less stark because Ngāumu forest is at least within the rohe of Ngāti Kahungunu ki Wairarapa.[97] But, as we come to, on the strict interpretation of "relates to" favoured somewhat by the High Court and preferred by William Young J, it might be said those hapū that had *take tipuna* in the underlying land, suffered the greatest prejudice in the Crown's acquisition of it. That is because it was acquired by the Crown (largely between 1853 and 1865) from them. The wider Ngāti Kahungunu interest — mana whenua — is more in the nature of a political prerogative to speak with a tribal voice for the land.[98]

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95 We express no view on the impact of the Raukawa and Pouākani settlements on the range of possible outcomes such processes might produce.

96 Defined in *The Pouakani Report*, above n 30, at 14 as "an ancestral right derived from continuous occupation, particularly one which would be traced from an ancestral canoe". It was defined in *Maori Land Law* (1960), above n 87, at 98 (emphasis added) as "a claim by descent from an ancestor whose right was recognised, or, more correctly, in whom the *take* of the land at one time rested".

97 Indeed this dynamic is similar to that between Raukawa and Ngāti Tūwharetoa on one hand and the beneficiaries of the Pouākani Trust on the other. It is the latter who are the descendants of the hapū actually awarded title to Pouākani by the Native Land Court in 1891. See *The Pouakani Report*, above n 30, at 1 and 186–188; and Pouakani Claims Settlement Act, s 9.

98 See *Kamo v Minister of Conservation*, above n 75, at [29].

The Crown did not acquire the land from Ngāti Kahungunu because the iwi never "owned" or had *take tipuna* in it.[99] There was never a single Ngāti Kahungunu chief or set of chiefs who could represent Ngāti Kahungunu in order to treat with the Crown for the acquisition of all Wairarapa lands. The matrix of tikanga rights in whenua do not work like that. In most cases these decisions were made at the hapū level where *take tipuna* generally resided. The relationship between *take tipuna* and mana whenua is nuanced and sometimes case specific. As is the relationship between hapū and iwi, and their respective (but overlapping) rangatira. The Tribunal was cognisant of those nuances, having reflected on them in the Wai 863 report.[100] This perhaps highlights the danger in over-generalising about the nature and significance of mana whenua. Tikanga in relation to whenua is complex, as the Tribunal is well aware.[101]

Conclusions on mana whenua

[95] In conclusion, therefore, we reiterate the following points. Mana whenua is unquestionably important but it must be applied in context. One context is the tikanga framework itself. Other tikanga principles may also need to be considered. Further, tikanga adapts to circumstances as they arise. That is why it has proved to be so resilient. Finally, it is important to remember that tikanga speaks to process as well as substance. It is through *whaka-ea* as a process that the apparently irreconcilable may be reconciled. It follows that we are unable to agree with the High Court Judge's

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99 See above at [75] for a discussion about customary ownership.

100 For a general discussion of the relationship between iwi and their constituent hapū in Wairarapa, see Wai 863 Report, above n 2, at 3–8. As to the Wairarapa lakes specifically, see Wai 863 Report, above n 2, at 653 (footnotes omitted):

> The abundance of tuna made the lake mouth a perfect place to live, and many hapū had rights in the lakes and wetlands. According to Hoani Tunuiarangi, 'all the people fished together at the mouth of the lake, but it was a different matter in the creeks and rivers ; each hapū had their own rights to these places'. Hapū of Rangitāne and Ngāti Kahungunu occupying areas around the lakes included Ngāi Te Aomataura, Ngāti Te Aokino, Ngāti Pakuahi, Ngāi Tūkoko, Ngāti Te Whakamana, Ngāti Rākaiwhakairi (Rākaiwakairi), Ngāti Komuka, Ngāti Hinetauira, Ngāti Rangitawhanga, Ngāti Te Hangarākau, Ngāi Tūtemiha, and Ngāti Rangiakau. Hapū generally had rights in the area of the lake adjacent to the land they occupied.

101 In light of William Young J's comments at [171] and to avoid misunderstanding, our point here is not that hapū should generally be preferred in resumption applications. Still less do we wish to encourage the Tribunal to reopen issues in relation to Ngāumu forest that it may not wish to revisit. Rather, our point is a general but important one: Tikanga in relation to whenua is as complex as any other system of land law. Judges should avoid making broad unqualified statements about the place of principles such as mana whenua within tikanga whenua where complexities that may be relevant to the case have not been fully explored. This will be especially so when that very matter is before an expert Tribunal. Our comments about the need to consider the interests of right-holding hapū as well as the less direct interests of wider iwi will come as no surprise at all to the Tribunal. It routinely deals with these tensions. Indeed the Wairarapa Tribunal specifically addressed the issue in its analysis of the Ngāumu forest applications. .

conclusion that an applicant without mana whenua is likely to fail in an application for resumption. We do not yet know what might result from *whaka-ea* processes. Nor has there been a full assessment of the effect of other tikanga principles. These are matters for further consideration in the Tribunal's iterative process. It is too soon to predict a likely outcome.

Issue three: the relevant prejudice issue

[96] Although the mana whenua issue is at the centre of the appeals in relation to the Pouākani land, we will also comment briefly on the relevant prejudice issue for two reasons. First, because it is not at all clear that the High Court Judge treated relevant prejudice and mana whenua as strictly separate issues. They are to some extent intertwined in his reasons.[102] In fairness, it must be accepted that they are not entirely unrelated.[103] Secondly, and in any event, the relevant prejudice issue is the subject of some discussion in the dissenting judgment of William Young J.

High Court

[97] As presaged, the High Court accepted that, in the particular circumstances of this claim, if the land were otherwise eligible for resumption, the Tribunal could take into account not just the 1949 taking, but also the history of the acquisition of the lakes and the land exchange that followed. These matters were sufficiently "related to" the loss of the Pouākani land and its loss. In this respect, the Judge said:[104]

> For Pouākani there was particular reason to look beyond the breach by which title was acquired by the Crown. That is because there were a series of closely interlinked Treaty breaches. Wairarapa Moana represents the successors of those who originally held legal title to lakes Wairarapa and Ōnoke. The Crown's conduct that gave rise to it acquiring title to the lakes and their surroundings was held to be a breach. There were then further breaches arising out of the Crown's failure to honour its promise to provide the owners with alternative land in the Wairarapa in connection with it acquiring title. There were yet further breaches arising from the Crown providing the largely valueless and inaccessible lands in the central North Island instead. The Crown continued to breach its obligations by starting to develop some of these lands for the power scheme without any consent from the landowners, and then by compulsorily acquiring that land for inadequate consideration. It is a remarkable story of injustice. I accept Mr Radich's argument that these are

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102 See HC judgment, above n 8, at [79]–[80].
103 See, for example, the discussion above at [92]–[94] on mana whenua and Ngāumu forest.
104 HC judgment, above n 8, at [87] (footnotes omitted).

> closely interrelated breaches, and that it is not inappropriate for the Tribunal to consider them when exercising its jurisdiction. It is, as he argued, a trail of tears. Those other breaches are permissible considerations under s 8A(2)(a)(ii) and s 8HB(1)(a)(ii) when the Tribunal considers whether the land should be returned.

[98] But the Court rejected the Tribunal's finding that the Pouākani land could be used as a "land bank" to compensate Ngāti Kahungunu ki Wairarapa for all of the historical Treaty breaches and associated prejudice they have suffered since 1840:[105]

> But I do not accept that the resumption power is available to provide the remedy for those other breaches, or the wider land-based Treaty breaches suffered by Ngāti Kahungunu.

[99] For this construction, the Court relied on three factors: first, the interlinked language employed in ss 8A and 8HB — "well-founded" claims, "relates … to" and "return"; second, the terms of the preamble to the Treaty of Waitangi (State Enterprises) Act 1988 and of the "Māori Principles" contained in the 1989 Crown Forest Assets agreement;[106] and third, the whenua-specific tino rangatiratanga (or tribal autonomy) guarantee in Article Two of the Treaty.[107] These factors all suggested, in the Judge's view, that in the usual run of cases, resumption was about facilitating the return to Māori of land which has itself been found by the Tribunal to have been acquired from their tīpuna in breach of Treaty principles, provided such return is, loosely speaking, a just or proportionate response to that specific breach, and bearing in mind the wider view of "related to" applied by the Judge in the unique circumstances of this case.

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105 At [88].

106 The 1989 Crown Forest Assets agreement led to the enactment of the Crown Forest Assets Act which we address in some detail in relation to the compensation issue. The Māori and Crown Principles annexed to the agreement are as follows:

Maori Principles

(i) uphold the articles of the Treaty of Waitangi and the protections in current legislation;

(ii) minimise the alienation of property which rightly belongs to Maori;

(iii) optimise the economic position of Maori.

Crown Principles:

(i) to safeguard the integrity of the sale by guaranteeing security of tenure to purchasers to avoid discounting and to encourage investment in the forestry industry

- security of tenure must involve purchasers having guaranteed access to wood and sufficient control over forest management to assure that wood supply;

(ii) honour the principles of the Treaty of Waitangi by adequately securing the position of claimants relying on the Treaty

- adequately securing the claimant's position must involve the ability to compensate for loss once the claim is successful.

107 HC judgment, above n 8, at [70]–[80].

A comment on the nature of historical Treaty claims

[100] Given their respective interests and positions, no party before us challenges that finding in the High Court, so we express no definitive view on its correctness. But we consider it relevant to note the following matters as they may not have been drawn to the High Court's attention. They at least suggest that the factual question of what claims (and therefore what prejudice) relate to what land is not as straightforward as might have been assumed:

(a) By the enactment of the resumption regime in 1988 (three years after the Tribunal was given retrospective jurisdiction),[108] historical Treaty claims were already routinely advanced tribally and on a thematic, rohe-wide basis. They included land and resource claims as well as claims about the loss of rangatiratanga or tribal autonomy. Themes in relation to land generally included matters such as loss of wāhi tapu, confiscation, early Crown purchase policies, Native Land Court processes, loss of promised reserves and so on.[109] Claims in relation to the loss of title to specific blocks were generally treated as particulars of the relevant theme.

(b) Native land legislation and colonial land acquisition policy in the latter half of the 19th and early 20th centuries were systemically inconsistent

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108 Treaty of Waitangi Amendment Act 1985, s 3(1).

109 See for example, the Ngāi Tahu claim lodged in 1986–1987 consolidated as the "Nine Tall Trees" or heads of claim covering most of the South Island (Waitangi Tribunal *The Ngai Tahu Report 1991* (Wai 27, 1991) at 3–5). See also the Muriwhenua claim originally lodged in 1985, and covering the rohe of the five northernmost iwi from the Maungataniwha range in the South to the Three Kings Islands in the North (Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) and *Muriwhenua Land Report*, above n 82). The Muriwhenua claimants' successful application for interim recommendations in relation to Crown land transfers, triggered the *Lands* case litigation (see Interim Report to Minister of Maori Affairs on State Enterprises Bill, December 1986 reproduced in *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* at 289–291).
This thematic approach can also be seen in the claim examples provided by the appellant to the Court of Appeal in the *Lands* case, above n 15, at 674–676: for Ngāi Tahu, the Otākou block claim was one of the "nine tall trees" of the wider Ngāi Tahu claim. The Ngāti Tama example focused on the Taranaki confiscation theme which understandably dominated its claim. The Ngāti Whātua example related to Woodhill Forest which had been compulsorily acquired under the Public Works Act for sand dune reclamation but also contained extensive unprotected burials. It formed part of the wider Ngāti Whātua o Kaipara ki te Tonga claims subsequently lodged (Wai 312, later covered by Waitangi Tribunal report for Wai 674: Waitangi Tribunal *The Kaipara Report* (Wai 674, 2006)).

with Treaty principles. By 1988, if not before, this was known.[110] It is certainly accepted in modern Crown Treaty settlement policy, although the degree of resulting prejudice for particular iwi is always a context-specific assessment.[111] For example, blocks alienated following full tribal consent, on fair terms (for the day), and with ample reserves excluded from sale, might involve breaches only in terms of the impact of that alienation on overall tribal land retention over time. On the other hand (again by way of example only), specific blocks acquired piecemeal through the purchase of undivided individual interests without tribal oversight, or taken for survey costs or public works, often involved more serious land-specific breaches.[112]

(c) Since tribal claims challenged Crown action (etc) over the entire colonial period and across the whole tribal estate, most claims also alleged that the Crown had breached the Treaty principle of "active protection". This by failing overall, through law, policy and practice, to ensure iwi retained sufficient permanent land reserves for their continued sustenance in the new economic and political order.[113] Such

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110 See for example, Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 38–48 in relation to Native Land laws and the Native Land Court; and Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 14–32 in relation to the confiscation and loss of remaining reserves.

111 See Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua | Healing the past, building a future. A guide to Treaty of Waitangi Claims and Negotiations with the Crown* (online ed, 2018), commonly referred to as the "Red Book" at 10:

> There have been many criticisms of the effects of the Native land laws. These include: the interpretation of customary rights to land, the early limitation of the number of owners who could appeal on a title (together with their ability to act as absolute owners rather than trustees for tribal land), the costs of the process, and its tendency to promote excessive sales and the fragmentation of remaining Māori holdings. The court system has been criticised by claimants and some historians for undermining the social structure of Māori society. These and other criticisms may prove valid when considering the operations of the Native Land Court system in particular districts. The long-term results of the system are clear. By the end of the 19th century, many hapū were left with insufficient lands for their subsistence and future development. Between 1865 and 1899, 11 million acres of Māori land in the North Island had been purchased by the Crown and European settlers.
>
> ...
>
> The Crown acknowledges that the operation and impact of the Native land laws had a widespread and enduring impact upon Māori society. In cases where claimants can demonstrate a prejudicial impact in their rohe, the Crown will acknowledge, in the context of an agreed settlement, that it breached its responsibilities under the Treaty of Waitangi.

112 See for example the Waitangi Tribunal reports referred to above at n 84.

113 As to the Treaty principle of active protection, see the *Lands* case, above n 15. Further, one of the three illustrative claim examples identified by the plaintiffs in that case, and referred to in the judgments, was just such a claim: it alleged failure of the Crown to set aside sufficient reserves for hapū out of the 530,000 acre NZ Company Otākou purchase of 1844–1856. It must be assumed

claims necessarily applied to all unretained land within a tribal rohe irrespective of the mode of its loss. As the area of retained land diminished over time, active protection issues intensified. The Wairarapa claims filed in 1988 also contained these allegations of insufficient land-base.[114] As noted, the claims were conceded by the Crown and upheld by the Tribunal.[115]

(d) Even in 1988, the historical Treaty claims process did not usually involve block-by-block reviews of land sales or takings. It was, rather, a review of the process and effects of colonisation on a tribe or tribes in a particular district. It would have been completely impractical to adopt a purely transactional approach and, in any event, would likely have undermined the important social objective of the Treaty of Waitangi Act.

(e) The Tribunal's power to make recommendations to "compensate for or remove" Treaty-breaching prejudice, must be understood in light of that distinctive background.

The minority views on relevant prejudice

[101] In agreement with the Crown's submission to this Court, the approach preferred by William Young J is considerably narrower than the middle course adopted

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that this example was known to the drafters of the 1988 amendments to the Treaty of Waitangi Act.

114 In the original Wai 97 claim filed in 1988, Wairarapa Moana Trust, the proprietors of the Mangakino Township (now Wairarapa Moana), the proprietors of the Owāhanga Station and the Wairarapa Māori Executive Taiwhenua alleged:

> III Failure by the Crown, as a matter of policy or practice or by acts of omission or commission, whether or not under express statutory authority, to adhere to the principles of the Treaty of Waitangi by ensuring that Maori were not deprived of such lands and estates, forest and fisheries and other benefits as were necessary for the sustenance, support, welfare and enjoyment of life.
>
> IV Failure by the Crown, as a matter of policy or practice, or by acts of omission or commission, whether or not under express statutory authority, to preserve continued use and occupation by Maori of their lands and estates, forest and fisheries and other benefits, in particular by the introduction of numerous legislative provisions and the institution of the Native (Maori) Land Court, which have had the intent or effect of depriving Maori of their customary use, occupation and enjoyment of lands and estates forests and fisheries and other benefits.

See also the comprehensive amended statement of claim on behalf of Ngā Hapū Karanga in 2003 incorporating Wai 97, 744, 897, 939, 944 and 1022 and others.

115 See above at [28].

by the High Court. His view is that the resumption regime was designed only to remedy Treaty-breaching acquisition of the specific land.[116] This transaction-based approach would preclude consideration of any wider context. He reasons therefore that only the Crown's compulsory acquisition of the Pouākani land in 1949 is relevant to its resumption. By contrast, the High Court's approach, as noted, would also allow the lakes acquisition to be factored into the resumption assessment.

[102] We consider William Young J's approach to be incorrect. Partly because the context of Treaty claims processes just canvassed is inconsistent with that view, but also for the following additional reasons.

[103] First, as this Court held in *Haronga v Waitangi Tribunal*, the 1987 agreement[117] and its 1989 addition were the price for Māori consent to large scale transfer of land and rights out of Crown ownership.[118] There is nothing about the terms of those agreements that suggested the Tribunal's approach to its recommendatory power was intended to be so radically transformed when dealing with State owned enterprise and Crown forest land.[119] On the contrary, the fact that both regimes were folded directly into the Tribunal's s 6 powers suggests the reverse.[120] Had the parties to the 1987 agreement intended that resumption claims would be diverted to a track more akin to orthodox litigation, a completely separate statutory process would have been added to make that clear. Indeed, it may be assumed that any attempt to overlay on the Tribunal's thematic approach to historical claims a more transaction-based track for resumption claims would have met stiff resistance from the Māori negotiators.

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116 See Young J's reasons below at [187].

117 Referred to above at [22].

118 *Haronga*, above n 17, at [64] and [76] per Elias CJ, Blanchard, Tipping and McGrath JJ.

119 In this context, we disagree that principle (ii) of the "Maori Principles" (set out above n 106) supports the view taken by William Young J. This is made clear by the subsequent Deed of Clarification to the 1989 agreement (executed on 17 October 1989, three months after the agreement) which demonstrates that principle (ii) related to any remaining Māori customary land (that is land yet to be investigated by the Maori Land Court) within Crown forests. This approach also ignores the fact that principle (i) is to "uphold the articles of the Treaty of Waitangi" and principle (iii) is to "optimise the economic position of Maori". These are not principles that suggest a narrow view was being taken.

120 As we noted above at [14], s 5 of the Treaty of Waitangi Act sets out the functions of the Tribunal. Only s 5(1)(a) refers to the making of recommendations on any claim submitted under s 6. No functional distinction is drawn between claims in the Tribunal's general jurisdiction and those in relation to resumable lands. By contrast, s 5(1)(aa)–(ad) refer separately to the Tribunal's memorial clearing function in relation to State enterprise, Crown forest and tertiary education institution lands. This also suggests that the legislature did not intend that the Tribunal's process of inquiry into the circumstances of resumable land should be any different to that for other land.

[104] Second, key phrases in s 8A such as "relates … to" and "return" need not carry the meaning William Young J promotes, which in fairness he accepts. It is not necessary, in furtherance of the Act's purpose, to construe "relates to" as if it required the Tribunal to extract the transaction that extinguished Māori ownership of the land from its surrounding circumstances and historical context. In fact this would contravene the object of the Tribunal's historical inquiry process, which is to assess colonisation's mechanisms and effects against the principles of the Treaty. Similarly, there is no reason to interpret "return" as if only former customary owners qualify. Its ordinary meaning is plainly wider than that. It is unnecessary and, in our view inappropriate, in light of Treaty principles of active protection, partnership and remedial right, to read that language down. Just like those of other former colonies, our colonial history has its idiosyncrasies in which iwi or hapū, through no fault of their own, do not quite fit the expected paradigm. Pouākani is clearly one such example. We should presume that the architects of the Treaty of Waitangi Act intended its processes to be capable of accommodating such cases where justice and reconciliation required it. This would be consistent with the broad and unquibbling approach mandated by the Treaty itself.

[105] Third, William Young J's primary concern is that a broader reading of "related to" would lead to widespread resumption. The first point in response is that it has not, even though the resumption regime has been in place for 45 years as has the Tribunal's broad contextual approach to historical claims. But secondly, and more importantly, the task is to assess what Parliament intended from the words it used and the purpose it sought to achieve. Neither is lacking in clarity. The application of them in any particular case will depend on a full understanding of the facts and the nature of the relevant claims.

[106] Finally in respect of the reasons of O'Regan J, we make the following observations. It is apparent that, in respect of the relevant prejudice issue, the High Court may have misunderstood how Waitangi Tribunal inquiries into historical claims are conducted. Although not in direct issue in these appeals, it would, in our view, have been irresponsible to leave that potential misunderstanding unremarked upon given its relevance generally to the resumption regime. Should the matter be taken up in subsequent proceedings by other parties, we have made it clear that the

view we have expressed here is not final. And we have also made it clear that, for the purposes of these applications, the position as set out in the High Court is binding. We do not apprehend the Tribunal will have any difficulty in complying with that direction.

Issue four: the Crown's interest liability issue

[107] This issue relates to Ngāumu forest. The issue is whether the Crown can avail itself of an extended interest rate holiday on the compensation that must be paid if resumption is awarded. To assess this, it is necessary to summarise the background that led to creation of the special compensation scheme for Crown forest land.

[108] When, in December 1987, the Crown and the New Zealand Māori Council agreed upon the resumption procedure eventually enacted in ss 8A–8H of the Treaty of Waitangi Act and ss 27–27D of the 1986 Act, it was envisaged that the Crown's commercial forestry lands — including the trees growing on the land — would be transferred to a state enterprise. Had this occurred, claims in relation to those forestry lands would have been within the purview of those provisions. But, as it happened, there was a change of course by the Government. This was in two respects:

(a) the assets to be disposed of would be only the trees rather than the land on which they were growing; and

(b) these assets would not be transferred to a state enterprise, but directly to private purchasers.

[109] This change of direction resulted in further litigation and negotiations. The result was a second agreement dated 20 July 1989 between the Crown, the New Zealand Māori Council and the Federation of Māori Authorities which was later implemented by the Crown Forest Assets Act. The Act introduced two changes relevant to the Ngāumu forest appeal. First, it amended the Treaty of Waitangi Act by inserting ss 8HA–8HI. These provisions conferred on the Tribunal the same jurisdiction as that for state enterprises, to make binding recommendations for the return of Crown forest land. Section 8HB is in substantially identical terms to s 8A, which is why the earlier issues are also relevant for Ngāumu forest. Secondly, and

most relevantly, s 36 and sch 1 of the Crown Forest Assets Act provides its own scheme for the payment of compensation to claimants who obtain resumption of Crown forest land. This scheme was essentially designed to compensate for the loss of the associated tree crop which, by then, would already have been sold by the Crown. The focus of this issue is the requirements of that scheme.

The background to, and overview of, the legislative scheme

[110] The agreement of 20 July 1989 envisaged the sale by the Crown of Crown forestry licences: long term licences to use the forest land for forestry purposes. As consideration for these licences, private purchasers would pay both an initial capital sum and market-based fees (usually referred to as "rent" in the documents) for the land.

[111] The agreement provided for a compensation scheme, should the Tribunal recommend that licensed land be resumed:[121]

> 8. If the Waitangi Tribunal recommends the return of land to Maori ownership the Crown will transfer the land to the successful claimant together with the Crown's rights and obligations in respect of the land and in addition:
>
> a) compensate the successful claimant for the fact that the land being returned is subject to encumbrances, by payment of 5% of the sum calculated by one of the methods (at the option of the successful claimant) referred to in paragraph 9 and,
>
> b) further compensate the successful claimant by paying the balance of the total sum calculated in paragraph 8(a) above or such lesser proportion as the Tribunal may recommend.
>
> …
>
> 9. The methods of calculating the total sum on which compensation payable under paragraph 8 is based, are
>
> EITHER
>
> a) (i) the market value of the tree crop and associated assets assessed at the time resumption is recommended. The value is to be determined on the basis of a willing buyer / willing seller based on the projected harvesting pattern that a prudent forest owner would be expected to follow or;

[121] Emphasis added.

(ii) the market stumpage of wood harvested each year over the termination period. Market stumpage to be determined in accordance with normal forestry business practice;

OR

b) the sales proceeds received by the Crown, plus a return on those proceeds for the period between sale and resumption. The return shall be limited to maintaining the real value of the sale proceeds during a period of grace of four years from the time of sale where a claim has been filed prior to the sale occurring, or from the time a claim is filed if after the sale. *The period of grace may be extended beyond four years* where the Tribunal is satisfied that an adequately resourced claimant is wilfully delaying proceedings *or that for reasons beyond its control, the Crown is prevented from carrying out a relevant obligation under this agreement*. Where the period of grace has expired then the subsequent return shall be based on one year government stock rate measured on a rolling annual basis plus an additional margin of 4% to reflect a commercial return.

…

A claim shall be deemed to be filed when the Registrar of the Waitangi Tribunal notifies the claimant that the claim in appropriate form is filed.

[112] The agreement further provided for the establishment of what became the Crown Forestry Rental Trust which would receive "rentals" (strictly licence fee payments). Interest on the accumulated rentals would be applied by the Trust to assist eligible Māori claimants to prosecute their Crown forest claims. In practice, and as a consequence of the Tribunal's district-based approach, the Trust funded historical and other expert evidence for claims in the entire inquiry district within which the relevant forest was situated. The rentals themselves were to be accumulated and, where resumption was recommended, paid out to successful claimants.

[113] Clause 9(b) of the agreement is important. It refers to the consequences for the Crown's four-year interest holiday on compensation payments where "the Crown is prevented from carrying out a relevant obligation under this agreement". This is a reference back to cl 6 under which:

The Crown and Maori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to

forestry lands and to make recommendations within the shortest reasonable period.

[114] The Crown Forest Assets Act, which, as noted, gave effect to the agreement, provides for the sale by the Crown of its forestry assets (being the trees and not the land), with such sales to be permitted only in association with the grant of a Crown forestry licence to the purchaser.[122] Land subject to such a licence is "licensed land".[123] A licence confers on the licensee a long-term right to use the licensed land for forestry purposes in consideration for which the licensee must pay an annual licence fee calculated by reference to the market rate for the use of the land, assuming an unimproved state.

The legislative scheme as to compensation

[115] Section 36 of the Crown Forest Assets Act provides:

> **36 Return of Crown forest land to Maori ownership and payment of compensation**
>
> (1) Where any interim recommendation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the return to Maori ownership of any licensed land, the Crown shall—
>
> (a) return the land to Maori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) pay compensation in accordance with Schedule 1.
>
> (2) Except as otherwise provided in this Act or any relevant Crown forestry licence, the return of any land to Maori ownership shall not affect any Crown forestry licence or the rights of the licensee or any other person under the licence.
>
> (3) Any money required to be paid as compensation pursuant to this section may be paid without further appropriation than this section.

[116] Schedule 1 is relevantly in these terms:[124]

> **Compensation payable to Maori**

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122 Crown Forests Assets Act, s 11.
123 Section 2(1).
124 Emphasis added.

1 Compensation payable under section 36 shall be payable to the Maori to whom ownership of the land concerned is transferred.

2 That compensation shall comprise—

(a) 5% of the specified amount calculated in accordance with clause 3 as compensation for the fact that the land is being returned subject to encumbrances; and

(b) as further compensation, the remaining portion of the specified amount calculated in accordance with clause 3 or such lesser amount as the Tribunal may recommend.

3 For the purposes of clause 2, the specified amount shall be whichever of the following is nominated by the person to whom the compensation is payable—

(a) the market value of the trees, being trees which the licensee is entitled to harvest under the Crown forestry licence, on the land to be returned assessed as at the time that the recommendation made by the Tribunal for the return of the land to Maori ownership becomes final under the Treaty of Waitangi Act 1975. The value is to be determined on the basis of a willing buyer and willing seller and on the projected harvesting pattern that a prudent forest owner would be expected to follow; or

(b) the market stumpage, determined in accordance with accepted forestry business practice, of wood harvested under the Crown forestry licence on the land to be returned to Maori ownership from the date that the recommendation of the Tribunal for the return of the land to Maori ownership becomes final under the Treaty of Waitangi Act 1975. If notice of termination of the Crown forestry licence as provided for under section 17(4) is not given at, or prior to, the date that the recommendation becomes final, the specified amount shall be limited to the value of wood harvested as if notice of termination had been given on that date; or

(c) the net proceeds received by the Crown from the transfer of the Crown forestry assets to which the land to be returned relates, plus a return on those proceeds for the period between transfer and the return of the land to Maori ownership.

…

5 For the purposes of clause 3(c), the return on the proceeds received by the Crown shall be—

(a) such amount as is necessary to maintain the real value of those proceeds during either—

(i) in the case where the claim was filed before the transfer occurred, a period of not more than 4 years

from the date of transfer of the Crown forestry assets; or

(ii) in the case where the claim was filed after the date of transfer of the Crown forestry assets, the period from the date of transfer of the Crown forestry assets to the date of expiration of 4 years after the claim was filed; and

(b) in respect of any period after the period described in subparagraph (i) or subparagraph (ii) of paragraph (a) (as extended under clause 6), equivalent to the return on 1 year New Zealand Government stock measured on a rolling annual basis, plus an additional margin of 4% per annum.

For the purposes of this clause, a claim shall be deemed to be filed on such date as is certified by the Registrar of the Tribunal.

6 *The period of 4 years referred to in clause 5 may be extended by the Tribunal where the Tribunal is satisfied—*

(a) that a claimant with adequate resources has wilfully delayed proceedings in respect of a claim; or

(b) *the Crown is prevented, by reasons beyond its control, from carrying out any relevant obligation under the agreement made on 20 July 1989 between the Crown, the New Zealand Maori Council, and the Federation of Maori Authorities Incorporated*.

…

The compensation issues that arise in relation to the Ngāumu forest

[117] As can be seen, sch 1 of the Crown Forest Assets Act provides for the calculation of a specified amount which sets the parameters for compensation associated with resumed Crown forest land. There are three bases for calculation of the specified amount:

(a) Clause 3(a): the market value of the trees;

(b) Clause 3(b): the market stumpage for trees harvested after the date of the final recommendation; or

(c) Clause 3(c): the net proceeds received by the Crown on the sale of the trees, plus a return on those proceeds between transfer and return to

Māori ownership. The rate of return is to be calculated in accordance with cls 5 and 6.

[118] Under cl 2, a successful applicant for resumption of the Ngāumu forest would be entitled as of right to five per cent of the sum selected under cl 3. But the Tribunal may order that up to 100 per cent be paid as "further compensation". The Tribunal has, of course, not got that far yet.

[119] The arguments addressed to us on this aspect of the case assume an election by the recipient entity of the option provided for in cl 3(c) (proceeds plus interest); and, in that event, the application of cl 5 (four-year interest holiday then penalty premium); and the interaction of that clause with cl 6(b) (effect of delay not within the Crown's control). Despite that, it is useful to put some values on the various bases on which compensation may be calculated to flesh out the context in which the arguments of the parties can be most completely assessed.[125]

[120] The market value of the trees as at 30 September 2018 was assessed at $74.1 million. Market stumpage, calculated forward over the remaining length of the licence (32 years as at 30 September 2018) was assessed at being $272.4 million.[126] This assessment is not particularly material for present purposes given:

(a) the practical requirement for comparison purposes to discount it to a present value (an exercise which has not been carried out); and

(b) the market stumpage figure can be expected to reduce as time goes by (as the period over which it is calculated diminishes).

[121] The starting point for the cl 3(c) calculation is the $29.6 million received by the Crown in October 1990 for the sale of the trees. Applying cls 3(c) and 5 of sch 1 without adjustment produces a specified amount of $253.6 million as at September 2018.

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[125] For consistency between dates, the figures we have chosen to use are based on the recommendation date being 30 September 2018. While newer calculations were available, they only updated the recommendation date for cl 3(c). These newer calculations are discussed at [122]. We have rounded all numbers to one decimal point.

[126] These figures should be regarded as indicative only.

[122] The $253.6 million can be compared with two other figures:

(a) Adjusting the $29.6 million received by Crown in October 1990 for inflation up to 30 September 2018 produces a figure of $51.2 million.[127]

(b) The indicative market value of the trees as at 30 September 2018 was $74.1 million.

The difference between the $253.6 million and the other two figures reflects the high interest rate built into the cl 3(c) calculation (four per cent over government stock rates) and the effect of compounding. This is further illustrated by calculations carried out in 2020 which projected an amount as at 31 August 2021 for the purposes of the hearing before the High Court. By this stage, the specified amount calculated under cl 3(c) on the same basis was over $292 million. This figure is continuing to increase.

The Tribunal and the High Court

[123] The Tribunal concluded that the relevant claim, Wai 97, was filed on 28 October 1988 and that the interest holiday would end on 28 October 1992.[128] The Tribunal found that the Crown had not, for reasons beyond its control, been prevented from resolving the claim. On the contrary, it found it was within the Crown's power to secure earlier resolution of the claim, but it had not.[129] There was therefore no reason to extend the interest holiday beyond 1992.

[124] The High Court considered that the Tribunal had failed to engage with the relevant considerations and so had erred.[130] First, any assessment of the Crown's performance had to be claim specific. A generalised conclusion that the Crown should have provided better funding to the Tribunal to speed resolutions, failed to engage with the facts that drove delay in the specific case. Second, it was not sufficient to blame delay on the Crown's overall policy of preferring negotiated settlements to resumption applications. Any assessment must relate to the way in which claims were addressed

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127 The updated calculations projected that this number could increase to $53.2 million by 31 August 2021.

128 See above at [55].

129 Preliminary Determinations, above n 7, at [305]–[310].

130 See discussion in HC judgment, above n 8, at [131]–[143].

in the Tribunal rather than Crown settlement policies. Third, the Tribunal must bear in mind that the 1989 agreement provided the parties would jointly use their best endeavours to resolve Crown forest claims within four years. In hindsight, and on any analysis, that target was hopelessly optimistic. The Tribunal too, had to engage with the realities of complex Treaty claims when making its assessment.

Submissions

[125] Ngāi Tūmapūhia-ā-Rangi submits:

(a) The High Court mischaracterised the statutory scheme, resulting in an incorrect interpretation of its effect. The money paid after the four-year grace period is not penalty interest, but rather return of sale proceeds. The Tribunal was correct to find that the four-year period should not be extended under the relevant considerations.

(b) The Tribunal wrongly conflated the question of whether to order resumption with the question of the nature and extent of compensation.

[126] The Crown submits the High Court correctly found that the Tribunal erred in law in not extending the grace period. The Tribunal had taken into account irrelevant considerations and failed properly to consider the obligations under the forestry agreement.

Our approach

[127] To recap, on return of licensed land to Māori ownership, the recipient receives:

(a) the land, which comes subject to the existing Crown forestry licence;

(b) the accumulated licence fees (rentals) for the licensed land, held by the Crown Forestry Rental Trust; and

(c) the right to any future rental payments.

In issue is what additional relief might be made available to the recipient in relation to the trees.

[128] Schedule 1 provides mechanisms for assessing the specified amount by reference to the market value of the forest (cl 3(a) and (b)) or the gain to the Crown (and thus corresponding loss to the recipient) associated with the sale of the forest to the licensee (cl 3(c)). Because the cl 3(a) and (b) calculations are made at the date the recommendation becomes final, there is no need for further adjustment for the time value of money. But if the recipient elects the cl 3(c) option, the starting point for the calculation will be the amount paid in the past — in this case, decades in the past — for the trees. Clauses 5 and 6 address the uplift required to allow for this.

[129] In providing for the calculation of the uplift in relation to the cl 3(c) specified amount calculation, the legislature appears to have had two purposes:

(a) To ensure that the uplift at least covers changes associated with the time value of money. This is provided for in cl 5(a).

(b) To incentivise the prompt resolution of claims by providing an appreciably enhanced uplift to start four years after the later of the sale of the assets or the filing of the claim. This is the effect of cl 5(b).

[130] At this point, we note an infelicity in the drafting. Under cl 6(b), the power to extend the four-year period is engaged if "the Crown is prevented, by reasons beyond its control, from carrying out any relevant obligation under the agreement made on 20 July 1989". The only relevant obligation of the Crown under the 20 July 1989 agreement is pursuant to cl 6 of that agreement which, despite the repetition, we set out again:

> The Crown and Maori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period.

Reasons beyond the control of a party may mean that best endeavours do not produce the desired result. But, as a matter of logic, they do not prevent the deployment of

best endeavours. There is thus a disconnect between the language of cl 6(b) of sch 1 which assumes a breach, albeit one excusable as caused by reasons beyond the control of the Crown, and cl 6 of the agreement which imposes an obligation which would not be breached if the failure to process claims promptly was for reasons beyond the control of the Crown.

[131] It is sensible then, to construe sch 1 cl 6(b) as engaged if the Crown has not been in breach of its best endeavours obligation. Looking at the 20 July 1989 agreement and sch 1 together, it is therefore legitimate to see cl 5(b) as having at least some of the characteristics of a penalty.

[132] As will be apparent, the Tribunal's processes in respect of the Ngāumu forest moved slowly. A number of claims were filed which, at least broadly, encompassed the forest, the first of which was in October 1988. And as noted, the Wai 863 Report made no specific findings in relation to the Ngāumu forest. An agreement in principle to settle Ngāti Kahungunu's claims was reached in 2016 and a Deed of Settlement between Ngāti Kahungunu and the Crown (subject to legislative sanction) was initialled in March 2018. Formal applications for resumption were not made until July 2018 (by Ngāi Tūmapūhia-ā-Rangi) and in November of that same year (by the Settlement Trust).

[133] The reasons given by the Tribunal in the preliminary determinations for concluding that the Crown was in breach of its best endeavours were:

(a) its adoption of a policy under which it would not negotiate with claimants who were litigating against it; and

(b) it should have provided more funding to the Tribunal so as to facilitate the earlier resolution of claims.

[134] On the High Court's approach, the Tribunal should have inquired into the reasons for any delay in relation to the resolution of the resumption applications rather than addressing — at best at a very high level of generality — what it saw as

deficiencies in the Crown's approach in identifying and settling claims for resumption of licensed land.

[135] The Tribunal's reasons were indeed at a high level of generality. They proceed on the basis that the Crown should have set about identifying all claims which might result in resumption of Crown forest land and funded the Tribunal to process such claims promptly. On this approach, it seems likely that the Crown would never be able to extend the period of grace in relation to resumption of Crown forest land.

[136] The level of generality meant the Tribunal gave no consideration to the reasonableness or otherwise of the Crown's overall approach to settlements, and to the Wairarapa settlements in particular. Nor did it factor in the delay effects (if any) of the Tribunal's own district inquiry procedures, an approach in which claimant community engagement and much of the evidential base was, we presume, funded by interest on the Ngāumu forest licence rentals. This in light of the Tribunal's firm view that it was only Treaty breaches on a district-wide scale that could justify resumption.

[137] In relation to the Tribunal's own funding, which was a particular focus, the Tribunal did not turn its mind to the counter-effect of other (reasonable) calls on public funding. These considerations are admittedly broad matters of impression, but this is a complex field with many moving parts. They are likely to be important considerations when assessing compliance with best endeavours obligations and what was within, or not within, the Crown's control.

[138] The Tribunal's approach also meant it did not engage with the fact that resumption of the Ngāumu forest was not sought, at least not in a formal application, until 2018.[131] Nor did it not turn its mind to the point at which resumption of the Ngāumu forest became a realistic possibility in light of reasonable capacity expectations of the Crown and Tribunal, the state of the evidence and the level of claimant community cohesion and capacity. Finally, the Tribunal had also to consider the relevance (if any) of the Ngāti Kahungunu Settlement Trust's apparent preference

[131] It might be said that such expectation was implicit given the Crown Forestry Rental Trust engagement in the inquiry and the fact that formal applications are not necessarily a requirement of s 8HB of the Treaty of Waitangi Act, but the Tribunal should have at least considered these questions.

to negotiate rather than press ahead with a resumption application. If, as the Tribunal indicated, it was not satisfied that the Trust (or indeed Ngāi Tūmapūhia-ā-Rangi) should be the recipient, how might that have affected its view of claimant capacity in terms of matters contributing to delay, but not within the Crown's control?

[139] Against this background, we agree with the High Court that the Tribunal's approach to the calculation of the specified amount was in error.

Issue five: the standing issue

The issue

[140] Mercury is the owner and operator of the Maraetai Power Station complex which forms part of an integrated system of power generating facilities on the Waikato River. It would plainly be affected by resumption of the Pouākani land and, after resumption was mooted, sought to be heard in opposition to the proposed resumption.

[141] There has been no dispute as to Mercury's right to be heard in the High Court on the judicial review proceedings associated with the resumption that were dealt with by the High Court. Nor is there any challenge to its entitlement to participate in the proceedings before us. What is in issue is whether it can be heard in the Tribunal in opposition to the proposed resumption. As we have noted, both the Tribunal and the High Court have ruled against Mercury.[132]

The legislative context

[142] Section 8C of the Treaty of Waitangi Act provides:

> **8C Right to be heard on question in relation to land transferred to or vested in State enterprise**
>
> (1) Where, in the course of any inquiry into a claim submitted to the Tribunal under section 6, any question arises in relation to any land or interest in land to which section 8A applies, the only persons entitled to appear and be heard on that question shall be—

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[132] *Memorandum-Directions of Judge C M Wainwright Concerning Application to be Heard from Mercury NZ Limited*, above n 6, at [3]; and HC judgment, above n 8, at [46].

(a) the claimant:

(b) the Minister of Maori Affairs:

(c) any other Minister of the Crown who notifies the Tribunal in writing that he or she wishes to appear and be heard:

(d) any Maori who satisfies the Tribunal that he or she, or any group of Maori of which he or she is a member, has an interest in the inquiry apart from any interest in common with the public.

(2) Notwithstanding anything in clause 7 of Schedule 2 or in section 4A of the Commissions of Inquiry Act 1908 (as applied by clause 8 of Schedule 2), no person other than a person designated in paragraph (a) or paragraph (b) or paragraph (c) or paragraph (d) of subsection (1) shall be entitled to appear and be heard on a question to which subsection (1) applies.

(3) Nothing in subsection (2) affects the right of any person designated in paragraph (a) or paragraph (b) or paragraph (c) or paragraph (d) of subsection (1) to appear, with the leave of the Tribunal, by—

(a) a barrister or solicitor of the High Court; or

(b) any other agent or representative authorised in writing.

[143] This section was inserted in the Treaty of Waitangi Act by s 4 of the Treaty of Waitangi (State Enterprises) Act, the preamble to which, in part, provides:[133]

…

(g) it is essential, in order to protect the position of Maori claimants and to ensure compliance with section 9 of the State-Owned Enterprises Act 1986, that there be safeguards—

(i) including power for the Waitangi Tribunal to make a binding recommendation for the return to Maori ownership of any land or interests in land transferred to State enterprises under that Act; and

(ii) requiring the Waitangi Tribunal to hear any claim relating to any such land or interests in land as if it or they had not been so transferred; and

(iii) *precluding State enterprises and their successors in title from being heard by the Waitangi Tribunal on claims relating to land or interests in land so transferred*;

…

[133] Emphasis added.

Mercury's argument

[144] Mercury's position is that in light of the fundamental nature of the right to the observance of the principles of natural justice, s 8C of the Treaty of Waitangi Act should not be interpreted to exclude an ability to participate by those not "entitled to appear and be heard". Section 8C(1) merely specifies who is entitled to appear. That Mercury is not entitled to be heard as a matter of right does not mean that the Tribunal cannot allow it to participate in a more confined way with leave.

[145] Mercury's argument addressed the powers of the Tribunal to hear evidence under cl 6 of sch 2 to the Treaty of Waitangi Act. This provides:

> **6 Evidence in proceedings before Tribunal**
>
> (1) The Tribunal may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter which in the opinion of the Tribunal may assist it to deal effectually with the matters before it, whether the same would, apart from this section, be legally admissible evidence or not.
>
> …

[146] Mercury also relied on the legislative history of s 8C. In the legislative process, s 8C(4) was proposed in these terms:[134]

> Nothing in this section affects the right of the Tribunal to hear testimony from any person pursuant to clause 6 of the Second Schedule to this Act or affects in any other way the provisions of that clause.

The proposal for such a subsection was dropped as being unnecessary.[135]

[147] In the course of argument, Mercury suggested that it could proffer evidence to the Tribunal and that, in such event, any restriction on appearing and being heard in s 8C(1) meant only that it could not make submissions.

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134 Treaty of Waitangi (State Enterprises) Bill 1987 (27-2).

135 Supplementary Order Paper 1988 (48) Treaty of Waitangi (State Enterprises) Bill 1987 (27-2) (explanatory note).

The Tribunal and the High Court

[148] As earlier noted, Judge Wainwright, the presiding Judge in the Wairarapa claims, issued a procedural direction on 2 March 2020. In it, the Judge determined that Mercury "is not an entity that is entitled to appear or be heard in relation to the applications before the Wai 863 Wairarapa ki Tararua Tribunal under section 8C".[136] In response, Mercury filed a judicial review application against the procedural direction and sought interim orders in the High Court preventing the Tribunal from issuing its "First Determination" until Mercury's judicial review challenge was determined. This application was declined by the High Court.[137] The procedural direction was then effectively adopted by the Tribunal in the preliminary determinations.[138]

[149] The High Court recognised the fundamental principle of the right to the observance of the principles of natural justice, which, as he noted, is affirmed by s 27 in the New Zealand Bill of Rights Act 1990.[139] But he then went on to say:[140]

> [40] But there is another fundamental principle — the supreme authority of Parliament to enact laws. It is recognised that in exercising that authority, Parliament will sometimes enact legislation that is inconsistent with fundamental rights. The function of the Courts remains to give effect to Parliament's intent when exercising its interpretative role. The Court presumes that Parliament did not intend to legislate inconsistently with fundamental rights, and it approaches the interpretive task on that basis. That interpretive approach is similar to that mandated by s 6 of the New Zealand Bill of Rights Act. But subject only to the possibility of certain extreme situations, the Court still interprets the legislation to give effect to Parliament's intent. Furthermore, and notwithstanding the presumption that Parliament would not have intended to legislate inconsistently with fundamental rights, the Courts should adopt the normal purposive, and not obstructive, interpretation of its enactments.

[150] He noted:[141]

> Section 8C(1) may use the theoretically ambiguous word "entitle", but s 8C(2) expressly says that no other person other than those listed shall be entitled to be heard on the question identified in s 8C(1). It then regulates what leave

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136 *Memorandum-Directions of Judge C M Wainwright Concerning Application to be Heard from Mercury NZ Limited*, above n 6, at [3].
137 *Mercury NZ Ltd v Waitangi Tribunal* [2020] NZHC 598 (Simon France J).
138 Preliminary Determinations, above n 7, at [7].
139 HC judgment, above n 8, at [39].
140 Footnote omitted.
141 At [42].

> could be exercised by the Tribunal in s 8C(3), and the leave only relates to those who qualify to be heard under s 8C(1). There is no ambiguity about "entitle" when read in the section as a whole. It is regulating who can and who cannot participate.

[151] He also drew on the preamble to the Treaty of Waitangi (State Enterprises) Act, the relevant part of which we have already set out:

> [44] The suggestion that s 8C should be read down, and that the reference to "entitled" should not be taken to prevent the Tribunal from exercising a discretion to allow such bodies to participate would be inconsistent with preamble (g)(iii). It is clear that when identifying the "*only* persons entitled to appear and be heard" (emphasis added) in s 8C(1) it was giving effect to the decision to "precluding" the state enterprises and their successors from being heard. To adopt any alternative interpretation would involve the Court not giving effect to the clearly expressed intention of Parliament.

[152] After rejecting Mercury's challenge, he concluded on this aspect of the case in this way:[142]

> [47] I note that this may not be the end of Mercury's natural justice rights. When fundamental rights are truncated by statutory provisions, the residual rights of the affected person should be fully emphasised. Mercury has a right to challenge decisions of the Tribunal by way of judicial review, as it does in the present proceedings, and such rights should not be limited. When the Crown appears before the Tribunal there could be no legitimate limitation on it presenting submissions and evidence from Mercury's perspective. It can call witnesses from Mercury. It might even be arguable that the Crown itself has an obligation to put Mercury's position squarely before the Tribunal. Given the truncation of fundamental rights[,] that would also be of assistance to the Tribunal. I note Grice J's observations [in *Raukawa Settlement Trust v Waitangi Tribunal*[143]] that such indirect input would be unappealing to the excluded party. But it is better than the alternative.

Our approach

[153] Section 27(1) of the New Zealand Bill of Rights Act provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

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142 Footnote omitted.

143 *Raukawa Settlement Trust v Waitangi Tribunal* [2019] NZHC 383, [2019] 3 NZLR 722.

The proposed resumption of the Pouākani land affects the interests of Mercury,[144] and absent a statutory direction to the contrary, Mercury is entitled to be heard in opposition to it. As will be apparent, s 8C is said to be a statutory direction to the contrary. In determining whether this is so, we must interpret s 8C and, in doing so, apply s 6 of the New Zealand Bill of Rights Act. This provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[154] Section 8C(1) lists those who are entitled to be heard on a resumption application, and by way of emphasis, s 8C(2) provides explicitly that no other person is entitled to be heard. There is an element of ambiguity in the wording. It is possible to read these subsections as excluding any other absolute right to be heard but not participation by leave. This is the interpretation proffered by Mercury. It is likewise possible to construe the subsections as excluding any entitlement to be heard, whether, as a matter of right or by reason of leave having granted by the Tribunal. This is the approach favoured by the Tribunal and the High Court. Both meanings are available on the wording of s 8C. As well, there is the possible interpretation, that we have also briefly mentioned, that s 8C(1) and (2), when read, in conjunction with sch 2 cl 6 of the Treaty of Waitangi Act merely prevent Mercury making submissions and do not preclude an offer of evidence that the Tribunal may or may not accept.

[155] If s 8C(1) and (2) had stood alone, it would have been open to the Court to interpret them in the manner proposed by Mercury, that is as denying Mercury a right to be heard as a party but not excluding the power of the Tribunal to hear from Mercury, or at least, considering the evidence it proffered if it chose to do so. Such an interpretation is not inconsistent with the wording of s 8C. So construed, s 8C would result in a derogation from s 27(1) of the New Zealand Bill of Rights Act, albeit one that derogates less than the interpretation adopted by the Tribunal and the High Court.

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[144] Section 29 of the New Zealand Bill of Rights Act 1990 provides that the Act applies to legal persons, such as Mercury NZ Ltd, so far as practicable except where the provisions of the Act otherwise provide (which s 27 does not).

So if s 8C(1) and (2) stood alone, s 6 of the New Zealand Bill of Rights Act might well have required adoption of Mercury's approach.

[156] The difficulty for Mercury is that s 8C does not stand alone.

[157] Section 8C has a significant legislative history in terms of the negotiations which followed the *Lands* case. Nevertheless, reference to these negotiations is rendered unnecessary by the part of the preamble to the Treaty of Waitangi (State Enterprises) Act which we have set out. This preamble captures the purpose of s 8C which it records as "precluding State enterprises and their successors in title from being heard by the Waitangi Tribunal on [resumption] claims". In light of the preamble, construing s 8C as not precluding an entitlement to be heard with the permission of the Tribunal would be inconsistent with the legislative purpose.

[158] We accordingly conclude that the High Court was right on this issue.

Conclusions

[159] The High Court found in relation to the Pouākani land, that:[145]

> Directing the land be transferred to an iwi that has no mana whenua in the land conflicts with the rights of the iwi that do, and this is inconsistent with tikanga and the principles of the Treaty.

A preliminary determination to make such a direction would therefore be unlawful.

[160] We have found this to be an incorrect statement of the position in two relevant respects. First, whether mana whenua should prevail over other tikanga principles in the circumstances of these resumption applications is itself a tikanga question that has yet to be finally determined by the forum invested with the statutory responsibility, expertise and local knowledge to make that assessment. It does not follow from the importance of mana whenua that it is the only relevant tikanga principle or that it must be applied irrespective of context. Second, and in any event, it is too soon to know whether *ea* may be achieved between mana whenua and Ngāti Kahungunu (however configured) by other, tikanga-consistent means.

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145 HC judgment, above n 8, at [147(d)].

[161] There is no appeal against the High Court's finding that the relevant prejudice for the Pouākani resumption applications includes the acquisition of the Wairarapa lakes and the subsequent land exchange in Pouākani, but does not include wider iwi prejudice. That must therefore remain the basis upon which these applications are considered going forward. We have nonetheless made some comments on this approach both because it was not treated in the High Court as completely separate from the mana whenua issue and because William Young J accepted the Crown's submission that a narrower approach should have been taken. This may be an issue in future resumption cases.

[162] In relation to the Ngāumu forest, we agree with the High Court that the Tribunal failed to take account of relevant considerations when making its preliminary determination as to the Crown's interest liability under sch 1 of the Crown Forest Assets Act. And as to Mercury, we also agree that it lacks standing in the Tribunal in relation to the Pouākani resumption applications.

Result

[163] We have found that the High Court was wrong to hold, as it did at [147(d)], that an applicant's lack of mana whenua would prevent the Tribunal from granting resumption. The appeal by Wairarapa Moana in SC 93/2021 must therefore be allowed in part. The Tribunal must proceed with its iterative process on the basis that while mana whenua is a very important consideration under s 8A of the Treaty of Waitangi Act, an applicant's lack of mana whenua may not be disqualifying in light of other relevant tikanga principles. Such evaluation is a matter for the Tribunal.

[164] The appeal by Ngāi Tūmapūhia-ā-Rangi in SC 127/2021 and the cross-appeal by Mercury in SC 93/2021 are dismissed.

[165] Issues as to costs may be dealt with by memoranda if they are not otherwise agreed. Memoranda will be no longer than five pages and must be filed and served within 20 working days.

WILLIAM YOUNG J

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Summary of my position

[166] I agree with the reasons and conclusions of the majority in respect of compensation and whether Mercury NZ Ltd was entitled to be heard by the Waitangi Tribunal. I dissent, however, in relation to the proposed resumption of the 787 acres of land compulsorily acquired by the Crown and on which part of the Maraetai Power Station complex is situated (the Maraetai dam land).

[167] There are two bases for this dissent.

(a) I consider that no likely claimant could establish the necessary nexus between well-founded claims of prejudice caused by breaches of the principles of the Treaty of Waitangi and resumption of the Maraetai dam land.

(b) If a necessary nexus can be established (which is the view of the majority) and the resumption applications must be determined by the Tribunal on the basis of the High Court's judgment (including the High Court's conclusions on what has been called the land-banking issue), then I think that the appeal against the High Court's decision in relation to what the Court saw as the tikanga issue should be dismissed.

[168] As well, I am very conscious of the claims settlement Bill currently before Parliament. I see respect for the Parliamentary process as warranting a more than usually cautious approach to the offering of opinions on matters not directly in issue before us. Because this provides something of a context for my discussion of the two bases for my dissent which I have just outlined, I will address it first.

Respect for Parliamentary process

[169] At [47] of their reasons, the majority observe:[146]

> … these appeals do not put the claims settlement Bill in issue in any way. Rather, they raise orthodox claims of statutory or other right: the right to have extant applications for resumption determined according to law, and the related right to test the implications of tikanga considerations in that context. They therefore involve no conflict with the terms of s 11 of the Parliamentary Privilege Act 2014, nor any breach of the common law principle of non-interference.

[170] I disagree with first sentence of [47]; this because I think it plain that, in ordinary language at least, the majority reasons does "put the claims settlement Bill in issue". However, to the extent that this is simply by reason of this Court dealing with "the right to have extant applications for resumption determined according to law", it is unexceptionable. There are "extant applications for resumption" before the Tribunal and this Court is entitled to resolve existing controversies in relation to those applications. However, given the legislative process underway, I think that the Court should be cautious about expressing opinions on issues that were not in play in the litigation in the High Court.

[171] I see this need for caution as being of general application. There is, however, one aspect of the majority's reasons in relation to which it is of distinct relevance. This is at [92]–[94] in relation to the Ngāumu forest. The preference of the Tribunal for a Ngāti Kahungunu recipient of the forest was not put in issue in High Court. It is therefore not part of the appeal before us. Accordingly, there is no need for the majority to engage with this aspect of the resumption applications. Nor is such engagement fundamental to the reasoning of the majority on the issues that the Court, having granted leave, must now determine. Despite the qualified disclaimer in n 101,

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146 Footnote omitted.

the comment that it is Ngāi Tūmapūhia-ā-Rangi that has suffered "the greatest prejudice", is plainly an invitation to the Tribunal to reconsider its preference for a Ngāti Kahungunu recipient. My concern about these paragraphs is that they are: (a) likely to further complicate the political process in relation to the claims settlement Bill; but (b) unnecessary to the determination of the issues before the Court.

Absence of required nexus

[172] I consider that in two respects, Wairarapa Moana ki Pouākani Inc (Wairarapa Moana) cannot establish the nexus required to justify resumption of the Pouākani land and that the same applies in relation to any other likely claimant:

(a) Wairarapa Moana does not have the kind of customary relationship with the land that the legislative scheme contemplates; and

(b) resumption of the land would go well beyond what is required "to compensate for or remove the prejudice" caused by the Treaty breaches associated with its acquisition.

No customary relationship

[173] I accept that there is no express requirement in the legislation for a customary relationship between the land to be resumed and the group to whom it is to be returned, or for the well-founded claim to relate to the circumstances in which the land was acquired by the Crown from its customary owners. But that acknowledged, it is clear that the paradigm case the legislature had in mind when enacting the resumption regime as warranting resumption was the wrongful taking of land from customary owners to whom (or to whose representatives) it should be returned. Indeed, to my way of thinking, the expression "returned to Maori ownership"[147] presupposes a return to those who stand in the shoes of the customary owners from whom the land was acquired.

[174] I consider that the Crown Forest Assets Act 1989 can be treated as being in pari materia with the resumption provisions in issue in relation to this aspect of the case.

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147 Treaty of Waitangi Act 1975, s 8A(2).

That statute gave effect to an agreement of 20 July 1989 between the Crown, on the one hand, and the New Zealand Māori Council and the Federation of Māori Authorities Inc, on the other. Annexed to this agreement were lists of Māori and Crown principles. The Māori principles were expressed in these terms:

> Maori Principles
>
> (i) uphold the articles of the Treaty of Waitangi and the protections in current legislation;
>
> (ii) minimise the alienation of property which rightly belongs to Maori;
>
> (iii) optimise the economic position of Maori.

The reference to property "which rightly belongs to Maori" seems to me to be based on the premise that the land not to be alienated (and thus to be susceptible to resumption) had been acquired from Māori wrongfully and ought to be returned. In this context, I see this as a reference to acquisition from customary owners.

Resumption of the Maraetai dam land would go beyond what is required "to compensate for or remove the prejudice" caused by the Treaty breaches associated with its acquisition

[175] On the language of ss 6(3) and 8A(2) of the Treaty of Waitangi Act 1975, the "well-founded" claim that may result in resumption must be a claim that:

> (a) any Māori or "group of Maoris" have been "prejudicially affected" by, in this instance, actions of the Crown;[148] and
>
> (b) "relates … to" the land proposed for resumption.[149]

[176] There was no finding that the taking of the Maraetai dam land by the Crown was, in itself, a breach of Treaty principles. Rather, the claims found by the Tribunal to be well-founded were in respect of circumstances that were associated with that acquisition: the work on the land that occurred without notice to the owners before acquisition and the amount of compensation paid. In the absence of a finding that the compulsory acquisition of the Pouākani land was itself wrongful, it could not sensibly

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148 Section 6(1).
149 Section 8A(2).

be contended that the land "rightly belongs to Maori". Subject to that quite important reservation, however, I accept that the corollary of the conclusions of the Tribunal is that Wairarapa Moana has well-founded claims that relate to the Maraetai dam land.

[177] A pre-requisite to a binding recommendation that the land be "returned to Maori ownership" is a finding by the Tribunal that:[150]

> … the action to be taken under section 6(3) to compensate for or remove the prejudice caused by … the act or omission that was inconsistent with the principles of the Treaty, should include the return to Maori ownership of the whole or part of that land or of that interest in land …

[178] If the only well-founded claims of Wairarapa Moana that relate to the Maraetai dam land are those associated with how it was compulsorily acquired, resumption of that land, worth $600 million in 2018, would go far beyond what is necessary to compensate for, or remove, the prejudice caused by the relevant acts or omission that were inconsistent with the principles of the Treaty. This is substantially why the Tribunal rejected the Wairarapa Moana claim for resumption.

[179] As the majority explain, the Tribunal took a broader approach in relation to the application by the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust (the Settlement Trust). On this approach, the wider Ngāti Kahungunu ki Wairarapa (Ngāti Kahungunu) claims of breaches of Treaty principles resulting in tribal landlessness related in whole or in part to the Pouākani land and thus the Maraetai dam land. It is this approach that, not entirely happily in my view, has been referred to as "land-banking".

[180] On the approach adopted by the High Court, the disproportionality between prejudice associated with the compulsory acquisition of the Maraetai dam land and the value of that land is not controlling. This is because the Pouākani lands came to be vested in the customary owners of Lakes Ōnoke and Wairarapa as an attempt by the Crown to compensate them for what happened in Wairarapa in relation to those lakes.

[181] In relation to the Settlement Trust resumption application, the High Court rejected the land-banking approach of the Tribunal. This is because the Judge saw that

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150 Section 8A(2)(a)(ii).

its corollary was that land could be resumed despite having been acquired by the Crown in circumstances in which no breaches of Treaty principles correlated to the acquisition of the land:[151]

> A striking feature of the Tribunal's approach is that it does not require there to be any well-founded claims about the land sought to be returned at all. The resumption can be provided as a remedy for Treaty breaches concerning other lands. As it happened, for Pouakani and potentially also the Ngaumu Forest, there are breaches in relation to the Crown's acquisition of those lands. But on the Tribunal's approach that is not a requirement. Indeed, on that approach there would really be no need for the qualifying breaches to even concern land. The lands subject to resumption become a "land bank" – a source of land to be used to remedy the Crown's Treaty breaches more generally. I see that interpretation as inconsistent with the text and purpose of the provisions.

[182] I think that the same applies to the High Court's willingness to treat what happened in relation to the lakes in Wairarapa as relevant to Wairarapa Moana's application for resumption. This is because the approach of the High Court treats Wairarapa Moana's claim for resumption as substantially premised on Crown breaches in relation to Lakes Ōnoke and Wairarapa. Such a claim relevantly "relates to" the Maraetai dam land on the High Court's approach because of the narrative connection. On the logic of this approach, the Maraetai dam land would be susceptible to resumption irrespective of whether its compulsory acquisition was itself a breach of Treaty principles. This is because even if that acquisition had been, in itself, entirely compliant with Treaty principles, the narrative connection relied on by the High Court would be unaffected and the claims in relation to the lakes would still relate to the Maraetai dam land.

[183] The comments of the majority at [101]–[105] suggest, I accept by implication, that there is no need for a claimant for resumption to show a breach of Treaty principles in relation to the acquisition from Maori of the land to be resumed. This proceeds on the basis that Crown purchasing practices in the late 19th and early 20th century were in breach of Treaty principles and there was, more generally, a breach of the duty of "active protection". The clear implication of this is that breaches of Treaty principles in relation generally to land acquisition policies and active protection can be said to "relate to" any land acquired by the Crown and which are still held either by a

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[151] *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 (Cooke J) [HC judgment] at [88].

state-owned enterprise or tertiary education institution or as a Crown forest, irrespective of whether that particular acquisition was in breach of Treaty principles. This was effectively the approach taken by the Tribunal in relation to the Settlement Trust application.

[184] I have two concerns about this.

[185] The first is that the approach of the majority creates unnecessary complications. Its effect is to require the Tribunal to deal with the resumption application based on a legal approach that the majority suggests is wrong. This puts the Tribunal in a difficult position. Under the approach of the High Court, it must deal with the resumption claims on the basis that the High Court's approach to land-banking is correct, a view that, appreciably, although not necessarily fatally, weakens the argument for a Ngāti Kahungunu recipient. I see this as likely to cause further litigation that will be unnecessarily complicated, for instance perhaps by issues as to whether the conclusion of the High Court as to land-banking and the approach of the majority (that it must be complied with even though it is perhaps, or probably, wrong) creates an issue estoppel against Ngāti Kahungunu.

[186] Further, and more importantly, the implications of the approach of the majority are very considerable; this because on the basis of what is proposed, and leaving aside the effect of settlements, most and perhaps all land, that that is subject to resumption regimes. I do not accept that this was intended by the legislature when those regimes were put in place. The majority play down the significance of this by noting that resumption regimes have not, to date, resulted in widespread resumption. What this overlooks is that until the present dispute it has not, at least as far as I am aware, ever been suggested that land acquired by the Crown in conformity with Treaty principles is susceptible to resumption. The suggestion that such land may be resumed is a radical departure from the past and likely to have very substantial consequences.

[187] I prefer to adopt what I regard as a more natural meaning of the phrase "relates to". On this approach:

(a) the well-founded claim must address prejudice to Māori in relation to the land to be resumed resulting from the breach of Treaty principles in respect of its acquisition from its customary owners (this for reasons already discussed); and

(b) return of the land to Māori ownership is an appropriate remedy "to compensate for or remove the prejudice" caused by the acts or omission of the Crown associated with that acquisition.

The mana whenua/tikanga issue

Overview

[188] The resumption applications by the Settlement Trust and Wairarapa Moana as advanced to the Tribunal were premised on proposals as to the recipient entity. In each case, this was to be the applicant (that is either the Settlement Trust or Wairarapa Moana). The resumption proposals did not include and were opposed by Raukawa and Ngāti Tūwharetoa.

[189] At the stage that proceedings before the Waitangi Tribunal had reached when the application for review was lodged, there was, in a practical sense at least, no extant claim before the Tribunal by Wairarapa Moana or any associated entity for resumption of the Maraetai dam land. Had the process not been interrupted by the judicial review proceedings in the High Court, the Tribunal would have continued its iterative process by seeking to identify a Ngāti Kahungunu-associated entity to be the recipient of the Maraetai dam land.

[190] Based on the High Court's approach, the resumption proposals of both the Settlement Trust and Wairarapa Moana would face substantial, probably insurmountable, difficulties. This is because as put forward, neither resumption proposal would, on the approach of the High Court, be tikanga compliant.

[191] I see the conclusions of the High Court on this issue as specific to the resumption proposals before the High Court, a conclusion that I think can be validated in the following way. Let us assume for the moment that the applications by Wairarapa Moana and the Settlement Trust had the support of mana whenua. Had this been so, the judgment of the High Court would, of course, have been very different. Indeed, I think it inconceivable that the High Court would have concluded that resumption in favour of Wairarapa Moana or a Ngāti Kahungunu entity would have been contrary to tikanga, if supported by mana whenua.

[192] An aspect of the majority's reasons that puzzles me is that they do not address specifically whether resumption in favour of either Wairarapa Moana or a Ngāti Kahungunu entity without participation by, and contrary to the will of, Raukawa and Ngāti Tūwharetoa would be contrary to tikanga. This, after all, is the key issue that was argued before us.

The approach of the Tribunal

[193] In its preliminary determinations, the Tribunal reviewed the mana whenua and tikanga arguments and went on:[152]

> However, we are not disposed to let the mana whenua arguments influence us against exercising our discretion in favour of recommending the return of the subject land at Pouākani to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.

[194] As the majority note, the Tribunal observed:[153]

> This preliminary determination *by no means disposes of all the important matters* we must decide, however. Nor would we say it is necessarily final. It expresses our formed views on key aspects of the exercise of discretion in section 8A and 8HB, but it remains possible that we may decide that nevertheless we should not make interim recommendations in the form we currently intend.

[195] The passage I have put in italics suggests to me that at least some "important matters" had been disposed of. These include the claim by Wairarapa Moana (and that of Ngāi Tūmapūhia-ā-Rangi in relation to the Ngāumu forest for that matter), and

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152 Waitangi Tribunal *Determinations of the Tribunal Preliminary to Interim Recommendations Under Section 8B and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020) at [259].

153 At [316] (emphasis added).

significantly, the mana whenua and tikanga objections to resumptions in favour of a Ngāti Kahungunu entity. It is true that none of this precluded further applications or refinements of existing applications and I accept that on the approach adopted by the Tribunal, there was nothing in the nature of a res judicata. It is, however, of significance because it helps to identify what was in issue before the High Court.

The approach of the High Court

[196] At issue in the High Court proceedings were the proposed resumption of the Maraetai dam land by either Wairarapa Moana or a Ngāti Kahungunu entity. Both resumption proposals still envisaged resumption that would not include, and was contrary to the wishes of, Raukawa and Ngāti Tūwharetoa.

[197] Ngāi Tūmapūhia-ā-Rangi's claim to the Ngāumu forest was not itself the subject of the litigation.

[198] On the approach of the High Court, a Ngāti Kahungunu claim for resumption would, on reconsideration by the Tribunal, face substantial difficulties as it was premised on the "land-banking" approach rejected by the High Court. If that claim were to fall away, this would leave at least potential scope for Wairarapa Moana to revive its claim for resumption. As well, the reasons given by the High Court would provide some assistance for Wairarapa Moana on the proportionality issue as the High Court considered that, in this regard, the history in relation to the Wairarapa lakes and the associated land exchange could be brought into account in favour of Wairarapa Moana alongside any prejudice associated with the compulsory acquisition.[154] However, on the High Court's approach to tikanga, the resumption proposals advanced by Wairarapa Moana and the Settlement Trust would almost certainly be rejected.

[199] The High Court's decision, however, left the applications by Wairarapa Moana and the Settlement Trust alive. They were to be reconsidered by the Tribunal. If the High Court was of the view that tikanga absolutely precluded resumption in favour of a non-mana whenua entity, there was no point in directing reconsideration. There is no indication in the judgment that resumption in favour of Wairarapa Moana or a

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154 HC judgment, above n 151, at [87].

Ngāti Kahungunu entity, if supported by mana whenua, would have been contrary to tikanga. This is a point that was not addressed by the Judge. Given that the only resumption proposals before him envisaged resumption in favour of non-mana whenua entities over the opposition of mana whenua, it seems to me that the sensible, not to mention conventional, approach is to construe the judgment as dealing with the controversy actually before the Court — that is whether unconditional resumption in favour on a non-mana whenua entity, without including, and over the opposition of, mana whenua would breach tikanga.

[200] Importantly, there is nothing in the High Court's judgment or its directions which would preclude amendment of those applications as to recipient entity, their reinforcement by mana whenua support or the Tribunal adopting any appropriate process to resolve, if resolution is possible, the tikanga obstacle to resumption.

The approach adopted by the majority

[201] The reasons of the majority give some indications as to how the applications by Wairarapa Moana and the Settlement Trust might be able to be dealt with on the reference back to the Tribunal. I do not take issue with those indications.

Ought the appeal to this aspect of the High Court's judgment be allowed or dismissed

[202] As I have noted, the majority do not directly engage with the conclusion of the High Court that the resumption proposals then on the table in the litigation before the High Court (either to Wairarapa Moana or a Ngāti Kahungunu entity and to the exclusion of Raukawa and Ngāti Tūwharetoa) faced the tikanga issues that the Court discussed. As I have also noted, I am puzzled by this. This, after all, was the key issue before us on this aspect of the case and it was to this issue that the parties addressed their arguments.

[203] If the majority are of the view that resumption in favour of Wairarapa Moana or a Ngāti Kahungunu entity to the exclusion, and contrary to the will, of Raukawa and Ngāti Tūwharetoa would be consistent with tikanga, then the appeal should obviously be allowed. But there is no substantive indication in their reasons as to what their view on this issue is. Rather they decide the case on the basis that the High Court

absolutely ruled out resumption (even if supported by mana whenua) in favour of a non-mana whenua party. As I have explained, I do not see this as contextual or realistic view of what the High Court decided.

[204] As it happens, there is nothing in the views expressed by the majority that cuts across the directions given by the High Court. In other words, had the judgment of the High Court not been challenged, there was nothing in it to preclude either revised applications for resumption by Wairarapa Moana, the Settlement Trust or other Ngāti Kahungunu entity or the adoption by the Tribunal of any process that it saw as appropriate to deal with the outstanding tikanga issues.

[205] On the basis of my view as to what the High Court actually decided and the non-engagement by majority with the correctness of that approach, I see the logic of their approach as being that the appeal should be dismissed.

O'REGAN J

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[206] I will address the issues identified in the majority reasons, using the same numbering system. I also adopt the definitions from those reasons.

[207] I agree with the majority reasons on issues four and five. In relation to issue one, I agree Wairarapa Moana's appeal is not moot, but I see the issue somewhat differently from the majority. I largely agree with the majority on the aspects of issue two (the mana whenua issue) that arise for resolution in the appeal. I express no view on the additional material about this issue included in the majority reasons. I do not consider the Court should engage with issue three (the relevant prejudice issue).

Issue one: the mootness issue

[208] Wairarapa Moana's application to the Waitangi Tribunal for binding recommendations was based entirely on the Treaty breaches relating to the acquisition of the Pouākani land in the 1940s. The expert evidence it adduced before the Tribunal was directed at quantifying the losses from the events related to the Pouākani land.

[209] The Tribunal said it considered it should not recommend the resumption of, and return to Wairarapa Moana of, the Pouākani land because the value of the land and the assets located on it was not proportionate to the prejudice suffered by the owners of the Pouākani land in 1949.[155]

[210] So, Wairarapa Moana's continuing interest in the proceedings is based on its intended re-litigation of the Tribunal's assessment of the proportionality of resumption as a remedy for breaches relating to the Pouākani land. Unless it can persuade the Tribunal to reverse its finding that the return of the Pouākani land to Wairarapa Moana is not proportionate to the prejudice, the mana whenua and tikanga issues that were the focus of the appeal to this Court will be moot. Wairarapa Moana's resumption application does not rely on events involving Lakes Ōnoke and Wairarapa and its counsel told us it intends to continue to pursue its resumption claim (based on the Treaty breaches at Pouākani only) on the same basis when the proceeding reverts to the Tribunal.[156]

[211] It is true that the basis for the Tribunal's finding that resumption and return to Ngāti Kahungunu is appropriate has been undermined by the High Court Judge's finding on the relevant prejudice issue, which has not been challenged in this Court. But the Tribunal's finding was that resumption and return of the Pouākani land to

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155 Waitangi Tribunal *Determinations of the Tribunal Preliminary to Interim Recommendations Under Section 8B and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020) [Preliminary Determinations] at [278]–[280]. The Tribunal did not make a provisional determination on a suitable recipient entity. Rather, it said the subject land should not be returned to any entity that is, or which represents, less than the "whole tribe" of Ngāti Kahungunu: at [266] of the Preliminary Determinations.

156 At the hearing, counsel were asked about Wairarapa Moana's limiting of its claim in that way, despite the High Court Judge's observation that it was open to the Tribunal to take into account events relating to the Lakes: *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 (Cooke J) [HC judgment] at [87]. Mr Radich KC and Mr Mahuika both confirmed that Wairarapa Moana intended to continue to pursue its case before the Tribunal on the same basis as it did at the preliminary determination stage.

Wairarapa Moana was disproportionate. As a matter of logic, it is hard to see why a change in the basis for Ngāti Kahungunu's separate resumption application affects the finding of disproportionality of Wairarapa Moana's application.

[212] One of the reasons given by the High Court Judge for deciding to allow the judicial review application to proceed despite the preliminary nature of the Tribunal's decision was that the Tribunal had reached "firm conclusions".[157] I agree. So it may be that Wairarapa Moana will face an uphill battle to persuade the Tribunal to change its "firm conclusion" on that issue.

[213] Having said that, I agree the Wairarapa Moana claim is not moot. While the Tribunal seems to have effectively ruled out Wairarapa Moana's resumption application on the basis of disproportionality, there is no legal impediment to the Tribunal changing its mind on that issue. Nor is there anything preventing Wairarapa Moana from changing its position and arguing that the Treaty breaches relating to the Lakes should be taken into account in considering its resumption application.

Issue two: the mana whenua issue

[214] The mana whenua issue and the relevant prejudice issue overlap and there is a degree of artificiality about considering one without the other. Nevertheless, that is the basis on which the appeal came before us. As just mentioned, this issue will affect Wairarapa Moana's resumption application only if the Tribunal reverses its preliminary finding on disproportionality.

[215] I do not think there is any doubt that the High Court Judge was correct to say that mana whenua is a highly relevant consideration in the context of a resumption application. Even Wairarapa Moana accepts that the paradigm resumption case would involve the return of land to an entity with a mana whenua connection to it.

[216] The High Court Judge accepted that the Pouākani land was technically eligible to be resumed under s 8A of the Treaty of Waitangi Act 1975.[158] He qualified this by

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157 HC judgment, above n 156, at [24].
158 At [89].

saying that lack of mana whenua is "a very important consideration when the exercise of the [resumption] power is considered".[159] Again, I do not think it can be seriously argued that lack of mana whenua is not a very important consideration.[160]

[217] The Tribunal's position was that Wairarapa Māori did not and never would have the status of tangata whenua in relation to the land at Pouākani. They were, the Tribunal said, "like Pākehā landowners in the district, manuhiri (visitors) in tikanga terms".[161] That was an important finding on its part and was the basis for the High Court Judge's analysis. He said he deferred to the Tribunal's expertise on matters of tikanga.[162]

[218] Having found Wairarapa Māori did not have mana whenua, the Tribunal then continued:[163]

> However, we are not disposed to let the mana whenua arguments influence us against exercising our discretion in favour of recommending the return of the subject land at Pouākani to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.

[219] While the Tribunal may not have intended it, this could be read as an assertion that the Tribunal can put to one side mana whenua and make a resumption order without taking it into account.

[220] Counsel for Wairarapa Moana argued that the situation was equivalent to a case where there are overlapping interests in land subject to a resumption application. In *Haronga v Waitangi Tribunal*, a majority of this Court said that such overlapping interests cannot be used as a reason for the Tribunal to decline to determine resumption claims.[164] I do not see that as analogous to the present situation. What this Court was dealing with in the *Haronga* case was the situation where two parties are seeking resumption. It does not address the present situation where Wairarapa Moana, as the party seeking resumption, has no mana whenua and the resumption is resisted by

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159 At [89].
160 As the majority acknowledges above at [84].
161 Preliminary Determinations, above n 155, at [258]. The Tribunal also described them as "interlopers in other tribes' rohe": at [245].
162 HC judgment, above n 156, at [109].
163 Preliminary Determinations, above n 155, at [259].
164 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [106] per Elias CJ, Blanchard, Tipping and McGrath JJ.

Raukawa, which does have mana whenua but which cannot make a claim in respect of the relevant land because it has settled its Treaty claims against the Crown.[165] It says nothing about the significance or otherwise of the resumption applicant having (or not having) mana whenua.

[221] I do not think that Wairarapa Moana's arguments in relation to mana whenua properly characterise what the High Court Judge decided. He did not decide that the statute required the return of land to mana whenua (at least, not in the present context: his finding in relation to the relevant prejudice issue had that effect, but that is not before us). In effect, Wairarapa Moana is isolating the mana whenua finding from the relevant prejudice finding, challenging the former and seeking to uphold the latter. In relation to mana whenua, the High Court Judge's findings were, as outlined before, that mana whenua was a very important consideration in the exercise of the power under s 8A. That is quite different from saying that s 8A does not permit the return of land to a party without mana whenua.

[222] The High Court Judge's concern with mana whenua related not to the breadth of the resumption power under s 8A, but rather to his conclusion that the Tribunal was required to apply tikanga and Treaty principles in exercising its functions. He saw the Tribunal's observation that it was not disposed to let mana whenua arguments influence it as effectively asserting that the Tribunal was not going to observe tikanga. He described this as the Tribunal exercising its discretion "*notwithstanding* the tikanga relating to the land".[166]

[223] The High Court Judge accepted that the position would be different if the Tribunal had considered that its proposed decision was consistent with tikanga, for example, if other principles such as ea prevailed over those of mana whenua as a matter of tikanga.[167] But he considered that was not the position. This was contested by Mr Mahuika for Wairarapa Moana. In fact the Tribunal observed that it was

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165 A point that was acknowledged by the Waitangi Tribunal: Preliminary Determinations, above n 155, at [259(d)]. The same applies to Ngāti Tūwharetoa. It was not represented at the hearing before us but we were told it supports the position of Raukawa. See Raukawa Claims Settlement Act 2014; and Ngāti Tūwharetoa Claims Settlement Act 2018.

166 HC judgment, above n 156, at [108] (emphasis in original).

167 At [108].

required to do its best in exercising its discretion under s 8A to assist the claimants to reach ea.[168]

[224] I accept that as the expert body, the Tribunal was entitled to place other aspects of tikanga ahead of mana whenua in the unusual circumstances before it. Despite the choice of words in its finding that it would not allow mana whenua to "influence" it, I think the better interpretation of the Tribunal's decision is that it did take mana whenua into account, but decided that other concepts of tikanga were more important in this case. The extensive reasons the Tribunal gave for not letting mana whenua arguments influence its decision show that it did consider mana whenua arguments but found they were not controlling.

[225] Raukawa argued that the Tribunal did not take into account the impact on Raukawa. It argued that requiring the Crown to transfer land over which Raukawa has mana whenua to another iwi or hapū would necessitate the Crown going back on the commitments it made to Raukawa in the Raukawa settlement, conflicts with the Crown's obligation of active protection of Raukawa and could amount to a fresh breach of the Treaty in relation to Raukawa. Wairarapa Moana did not engage with these submissions in much depth, but the Tribunal will need to do so when it reconsiders its preliminary determinations.

[226] I do not express a view on the majority's observations about engaging tikanga processes to resolve resumption applications.[169] The majority discusses possible outcomes predicated on the possibility of some accommodation between Wairarapa Moana and/or Ngāti Kahungunu and mana whenua. In the Tribunal, the High Court and this Court, Wairarapa Moana has taken a strong adversarial stance against Raukawa, even to the extent of having it excluded as a party before the Tribunal.[170] At the hearing before us, Mr Finlayson KC for Raukawa described Wairarapa Moana's approach as going out of its way to "freeze Raukawa out". Wairarapa Moana argued strongly before the Tribunal that it did, in fact, have a mana

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168 Preliminary Determinations, above n 155, at [237].

169 Above at [86]–[91].

170 Waitangi Tribunal *Decision of the Tribunal on Entitlement of Settled Parties to Participate* (Wai 863, 2018). This decision was reversed by the High Court in a judicial review proceeding commenced by Raukawa: see *Raukawa Settlement Trust v Waitangi Tribunal* [2019] NZHC 383, [2019] 3 NZLR 722.

whenua connection to the Pouākani land. The evidence before both the Tribunal and the High Court contradicted that and Wairarapa Moana does not now challenge the Tribunal's finding described above at [217].

[227] In these circumstances, I prefer to address the judicial review issues arising from the case actually before us and not venture a view on a case that has not yet, and may never, come to pass. A number of possibilities for changes in position of the parties exist and I would leave it to the Tribunal to address them if and when they actually arise.

Issue three: the relevant prejudice issue

[228] As noted by the majority, Wairarapa Moana's argument avoided the relevant prejudice issue. No doubt Wairarapa Moana saw the High Court's finding on that issue as helpful to it because it assists its argument that the Tribunal should reconsider its conclusion that the appropriate party to receive the Pouākani land on resumption was an entity representing all of Ngāti Kahungunu, not Wairarapa Moana. However, as mentioned earlier, that would assist Wairarapa Moana only if the Tribunal were to reverse its earlier conclusion that Wairarapa Moana's claims in relation to the Pouākani land were such that resumption and return of the Pouākani land to Wairarapa Moana would be disproportionate.

[229] I do not think that the majority's analysis of the relevant prejudice issue could be interpreted as anything other than an indication that they consider the High Court decision on the relevant prejudice issue wrong.[171] I do not consider that appropriate in circumstances where those who would have argued in favour of the upholding of the High Court decision if called upon to do so did not have the chance to make submissions on the issue.

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[171] See the majority reasons above at [96]–[100].

Issue four: interest liability and issue five: standing

[230] As indicated earlier, I agree with the majority reasons on these issues.

Solicitors:
Kāhui Legal, Wellington for Wairarapa Moana ki Pouākani Inc
Chapman Tripp, Auckland for Mercury NZ Ltd
Crown Law Office, Wellington for Attorney-General
Anderson Lloyd, Dunedin for Raukawa Settlement Trust
Dixon & Co Lawyers, Auckland for Ms Griggs and Mr Chamberlain

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CRI-2022-463-53
[2023] NZHC 145

BETWEEN	TIO FAULKNER Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent

Hearing: 10 October 2022

Appearances: Appellant in person
A A Hopkinson for Respondent

Judgment: 9 February 2023

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 9 February 2023 at 4PM

Registrar/Deputy Registrar

Introduction

[1] Mr Tio Faulkner (the appellant) appeals against the decision of Judge P A Steven delivered in the Tauranga District Court on 4 November 2021 in which she found the appellant guilty and convicted him on six charges related to offending under the Resource Management Act 1991(RMA).[1] The Judge entered convictions on each of the six charges on 11 November 2021.[2]

[2] The appellant appeals against his convictions.

The charges

[3] The charges on which he was convicted are as follows:

(a) Between 1 September 2018 and 7 October 2019 at or near Matapihi Road, Matapihi, the appellant contravened or permitted a contravention of s 12(1)(a) of the RMA by reclaiming an area of the foreshore or seabed in the coastal marine area when that reclamation was not expressly allowed by a national environmental standard, a rule in a regional coastal plan, a rule in a proposed coastal plan, or a resource consent.[3]

(b) Between 1 September 2018 and 7 October 2019 at or near Matapihi Road, Matapihi, the appellant contravened or permitted a contravention of s 12(1)(e) of the RMA by disturbing the foreshore or seabed in the coastal marine area in a manner that has or is likely to have an adverse effect on plants or animals or their habitat, when that disturbance was not expressly allowed by a national environmental standard, a rule in a regional coastal plan, a rule in a proposed coastal plan, or a resource consent.[4]

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1 *Bay of Plenty Regional Council v Faulkner* [2021] NZDC 21536 (District Court judgment).
2 *Bay of Plenty Regional Council v Faulkner* [2021] NZDC 22141.
3 CRN 19070502125. Sections 338(1)(a) and 339(1)(a) Resource Management Act 1991, maximum penalty imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000.
4 CRN 19070502131. Sections 338(1)(a) and 339(1)(a) Resource Management Act, maximum penalty imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000.

(c) Between 30 July 2019 and 8 October 2019 at or near Matapihi Road, Matapihi, the appellant contravened or permitted a contravention of s 15(1)(b) of the RMA by discharging a contaminant (namely water containing faecal bacteria from a piggery) onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water when that discharge was not expressly allowed by a national environmental standard, a rule in a regional coastal plan, a rule in a proposed coastal plan for the same region or a resource consent.[5]

(d) On 13 August 2020 at or near Matapihi Road, Matapihi, the appellant contravened or permitted a contravention of s 15(1)(b) of the RMA by discharging a contaminant (namely water containing faecal bacteria from a piggery) onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water when that discharge was not expressly allowed by a national environmental standard, a rule in a regional coastal plan, a rule in a proposed coastal plan for the same region or a resource consent.[6]

(e) On 13 August 2020 at or near Matapihi Road, Matapihi, the appellant contravened or permitted a contravention of an abatement notice by discharging piggery effluent to land in circumstances where it may enter water being an offence under s 338(1)(c) of the RMA.[7]

(f) Between 14 November 2019 and 23 December 2019 at or near Matapihi Road, Matapihi, the appellant contravened or permitted a contravention of s 22(2)(a) of the RMA by failing to provide

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5 CRN 19070502132. Sections 338(1)(a) and 339(1)(a) Resource Management Act, maximum penalty imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000.

6 CRN 20070501287. Sections 338(1)(a) and 339(1)(a) Resource Management Act, maximum penalty imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000.

7 CRN 20070501288. Sections 338(1)(c) and 339(1)(a) Resource Management Act, maximum penalty imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000.

information as directed by an enforcement officer, namely his full name, address, and date of birth.[8]

The Judge's decision

[4] In her decision the Judge summarised the factual background to the charges. It is convenient to set out her summary in full:[9]

> [16] On 23 July 2019, a Council land management officer, Mr Matthew Davis, was carrying out aerial surveys near Tauranga Harbour when he noticed what appeared to be a structure protruding into the harbour at the property's western edge. He also observed a piggery in this area. Mr Davis took photographs of this part of the property and then provided those photographs to the Council's compliance team.
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> [17] On 31 July 2019, Council enforcement officers ('enforcement officers') inspected the property where they found that there had been a significant volume of construction waste deposited on the foreshore of the CMA, creating a flat platform and extending the land area of the property onto the foreshore in the CMA. The deposited material consisted of concrete and fill, but also contained plastic wrap and rebar.
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> [18] The officers measured the reclaimed area and found it extended approximately 15 m into the CMA. At that stage the area of reclamation protruding into the harbour was 30 m in width and 2-3 m deep. The officers estimated that the volume of material in the CMA was 900 m^3 to 1,350 m^3. The officers observed that more material had been deposited in the CMA at this location since the Council land management officer took aerial photographs of the area on 23 July 2019.
>
> [19] During the inspection the officers also saw a piggery beside the fill site that contained at least 20 pigs. The officers saw a flow path of water from the piggery to the edge of the CMA. The officers took a sample of the piggery water at the point where it had ponded at the edge of the CMA. When that sample was later analysed it was found to have faecal coliform levels of 57 million cfu/100ml, E.coli levels of 35 million cfu/l00ml and suspended solid levels of 7,100 g/m^3.
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> [20] When Council officers spoke with Mr Faulkner about these issues on 9 August 2019 they told him that the works associated with the deposition of material on the foreshore and the discharge of pig effluent breached the Council's regional plan rules and required a resource consent.
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> [21] However, Mr Faulkner responded that he held an "intellectual resource consent" authorising all works at the property that was issued to him by the "Tangatawhenua Wealth and Resource Management Authority™©". It is worth noting here, that the consent held by the

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8 CRN 19070502141. Sections 338(2)(a) and 339(2) Resource Management Act, maximum penalty a fine not exceeding $10,000 and where the offence is a continuing one, to a further fine not exceeding $1000 for every day or part of a day during which the offence continues.

9 Footnotes omitted.

[appellant] was the subject of a later pre-trial ruling made that it is not a lawful authority under the RMA as it had not been issued by a consent authority, as defined in s 2 of the RMA.

[22] On 30 August 2019, the Council received a complaint from a member of the public that construction waste was being dumped into the CMA adjacent to the property.

[23] On 4 September 2019 an enforcement officer issued an abatement notice to the [appellant] requiring him to immediately cease the unauthorised reclamation of the foreshore in the CMA at the property. That notice was not appealed.

[24] On 7 October 2019 enforcement officers executed a search warrant at the property. The officers found that more material had been deposited and that the reclamation area had been extended further into the CMA since the previous Council inspection on 23 July 2019. The volume of demolition waste and fill deposited in the CMA was measured to be 1,422 m^3 (with 256.7 m^3 being the additional amount of material deposited since 23 July 2019). The material used for the reclamation work contained reinforcing steel, concrete, wood, plastic and polystyrene.

[25] On 7 October 2019 the officers also measured the distance from the piggery to the CMA to be 8 m. The officers counted 37 adult pigs and 12 piglets in the piggery at that time. The officers also saw effluent from the piggery had flowed from the pigge1y into two areas of ponded stormwater between the piggery and the harbour. A sample of this ponded water taken at a point 5 m from the harbour, which following analysis, was found to have faecal coliform levels of 47,000 cfu/l00ml and E.coli levels of 30,000 cfu/100ml.

[26] On 4 November 2019 the Council went to the property to check compliance with the abatement notice issued on 4 September 2019. During the inspection the Council served a second abatement notice on Mr Faulkner, this one requiring him to immediately cease discharging piggery effluent to land where it may enter water. That notice was also not appealed.

[27] An electronic copy of that abatement notice, along with the first abatement notice dated 4 September 2019, was sent to the [appellant] by email on 7 November 2019. In that email Mr Faullmer was also requested to provide the information described in s 22 of the RMA by 14 November 2019 (e.g. his date of birth, address and full name). The content of s 22 was included in the email. Mr Faulkner has never provided the infmmation.

[28] On 13 August 2020 enforcement officers executed a further search warrant at the property. During the execution of that [search] warrant they observed the piggery near the harbour' s edge was still in operation and contained 23 pigs. The Council officer saw effluent from the piggery ponding outside the piggery and overland flow paths from that ponded effluent.

[29] During the inspection on 13 August 2020 a Council officer took a sample of water in a ponded area to the south of the piggery. A flow path from this ponded area extended for 6-7 m towards the harbour before

> disappearing into a hole. When that sample was analysed it was found to contain faecal coliform levels of 200,000,000 cfu/100mL and E.coli levels of 58,000,000 cfu/100mL.

[5] The Judge then identified and addressed the following elements of the offending which the respondent must prove beyond reasonable doubt in relation to the charge alleging breach of s 12(1)(a) of the RMA:[10]

(a) the activity was on the foreshore or seabed;

(b) the activity was within the Coastal Marine Area (CMA);

(c) the activity is a reclamation;

(d) the activity was not permitted by a national environmental standard, a rule in a regional coastal plan or proposed plan, or a resource consent; and

(e) the activity was caused or permitted by the appellant.

[6] As regards the first two elements the Judge referred to the evidence of the respondent's witnesses and concluded:

> [53] The evidence of all of these witnesses was undisturbed by the cross-examination of the [appellant]. I find that the question of whether the activity occurred on the foreshore or seabed and in the CMA has been proven to the requisite standard (beyond reasonable doubt) by a comfortable margin.

[7] As regards the issue of whether the activity is a reclamation, the Judge noted that although the term *reclaim* is not defined in the RMA, the Bay of Plenty Regional Coastal Environmental Plan (RCEP) defines the term *reclamation*:

> **Reclamation:** An activity that results in the formation of permanent land located above mean high water springs from land that was formerly below the line of mean high water springs (in the coastal marine area). Reclamation does not include:
>
> (a) The formation of land above mean high water springs as a result of natural processes, including accretion; or

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[10] District Court judgment, above n 1, at [32] regarding CRN 19070502125.

(b) Structures such as breakwaters, moles, groynes, seawalls or jetties.

[8] Applying that definition to the evidence given by the respondent's witnesses, the Judge concluded:

> [64] In his legal submissions, Mr Hopkinson referred me to the definition of 'structure' in s2(1) of the RMA as meaning:
>
> > Any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft.
>
> [65] I agree with the Council that the works are not appropriately described as a structure and nor were they the result of natural processes (such as accretion). While there was some (weak) evidence from the [appellant] to suggest that the works may have been carried out for the purpose of erosion protection, given the nature and extent of the works I find that the Council has proven beyond reasonable doubt that the works within the CMA do in fact amount to a reclamation.

[9] In addressing the issue of whether the respondent had proved that the activity was not permitted by a national environmental standard, a rule in a regional coastal plan or proposed plan, or a resource consent, the Judge referred to s 12(1)(a) of the RMA. The Judge noted the respondent's evidence that none of the exceptions applied and none of the rules contained in the RCEP permitted the work or activities that had been carried out on the appellant's Matapihi property, and no resource consent had been issued by the respondent authorising the works within the CMA. The Judge concluded:

> [76] For completeness, the [appellant's] questioning of witnesses and his approach in closing, as revealed in the affidavit, also suggested he had existing use rights for the activities conducted on his land and within the adjoining part of the CMA, which are protected under either ss 10 or 20A of the RMA, an argument that was directed at all of the charges (excluding those related to s22 of the RMA) and I address these and other arguments raised by the [appellant] at the end of this decision. It suffices to note my finding that the activities on the land and within the adjoining CMA are not protected by existing use rights recognised by the RMA.

[10] And in relation to the issue of whether the activity and work carried out at the appellant's Matapihi property and adjacent inter-tidal area within the CMA was caused or permitted by the appellant, the Judge summarised the respondent's evidence regarding the conduct of the appellant and found:

> [81] In this case there is ample evidence of the [appellant's] knowledge and involvement stemming from his ownership, occupation and control exerted in relation to the property:
>
> …
>
> [86] I find that the Council has proven beyond reasonable doubt that the [appellant] caused or permitted the reclamation of the area of the foreshore within the CMA at the western end of the land at 128 Matapihi Road.

[11] The Judge then considered the charge alleging the offence under s 12(1)(e) of the RMA. Her Honour found that the charge under s 12(1)(e) required proof of different elements than required in respect of the s 12(1)(a) offending. Having first considered whether the charge involved the appellant being subject to double jeopardy by the s 12(1)(e) charge, and whether the charge was precluded by limitation, she concluded that this charge was proved beyond reasonable doubt.[11]

[12] In relation to the charges alleging offences under s 15(1)(b) of the RMA by discharging contaminated water from the piggery, the Judge found that the evidence established that contaminated water had been discharged during the two time periods specified in the charges,[12] and that the appellant was responsible and liable under s 15(1)(b).[13]

[13] The Judge then addressed the charge alleging that the appellant contravened or permitted a contravention of an abatement notice by discharging piggery effluent to land in circumstances where it may enter water being an offence under s 338(1)(c) of the RMA.[14] Her Honour found that the respondent's evidence proved that an abatement notice was issued and correctly served on the appellant on 4 November 2019 which required him to immediately cease discharging piggery effluent to land where it may enter the water in the CMA.[15] The Judge referred to the evidence of the prosecution witness who visited the property on 13 August 2020 to undertake an inspection of the reclamation area and the piggery and observed a discharge coming from the piggery which was sampled and subsequently analysed as containing faecal contaminant. Accepting that evidence the Judge accordingly found the charge of

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11 At [120] regarding CRN 19070502131.
12 At [139][140].
13 At [148] – [150].
14 CRN 20070501288.
15 At [161].

alleging the appellant contravened the abatement notice on 13 August 2020 to be proven beyond reasonable doubt.[16]

[14] The Judge then considered the two separate charges under s 22(2)(a) of the RMA alleging that the appellant failed to provide information as directed by an enforcement officer, namely his full name, address, and date of birth.[17] The Judge concluded that the prosecution evidence proved that the appellant was guilty of one of the two charges, namely the charge based on the direction given to the appellant by the respondent's enforcement officer on 7 November 2019.[18] The Judge dismissed the second charge as she found that it was based on an erroneous understanding of the request provided to him.[19]

[15] The Judge then considered and rejected the appellant's submissions that the provisions of the RMA on which the charges were based did not apply to him. The Judge described the appellant's submissions as follows:

> [197] In his closing submissions, Mr Hopkinson anticipated closing arguments from Mr Faulkner based upon his approach during the trial, and his submissions fairly capture some of the arguments, to the extent they are able to be discerned, from the affidavit filed by the [appellant], namely:
>
> (a) the reclamation works carried out at or near 128 Matapihi Road are lawful as they occurred in accordance with his rights as tangata whenua or mana whenua to exercise undisturbed customs and usage rights over Māori-owned land;
>
> (b) the [appellant] had no statutory duty to respond to the enforcement officer's direction under s22(2)(a) of the RMA because he is not a "natural person" (i.e. an individual), but part of a collective (i.e. tangata whenua);
>
> (c) the prosecutor cannot prove "its claim and its authority over Māori customary land";
>
> (d) the Council officers has insufficient regard to the Treaty of Waitangi and/or tikanga when they inspected the property and gathered the evidence relied on by the prosecutor at the trial.

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16 At [163][164] and [171].
17 CRN 19070502141 and CRN 19070502142.
18 At [195] regardingCRN 19070502141.
19 At [196].

[16] The Judge referred to and adopted the findings made in the pre-trial ruling of Judge Kirkpatrick[20] and concluded:

> [198] Mr Hopkinson submitted, and I agree, that none of these arguments constitute a valid defence to any of the charges. The laws of Parliament (including the RMA and the CPA) apply to the property and to Mr Faulkner.

[17] The Judge also dismissed the appellant's submissions which appeared to be in the nature of a challenge to the sovereignty of Parliament,[21] and also dismissed the appellant's possible reliance on existing use rights under s 20A(1) of the RMA.[22]

[18] The Judge concluded that she was satisfied that the six charges set out at [3] above were proved beyond reasonable doubt, and she dismissed the alternative s 12(1) charges which were withdrawn by the prosecutor.[23] The Judge also dismissed the second charge of failing to provide information.[24]

Procedural history of this appeal

[19] Following the Judge's decision of 4 November 2021 finding the appellant guilty of the six RMA offences, a sentencing date was initially scheduled for 22 December 2021 and subsequently rescheduled for 19 January 2022 after the appellant had declined to meet with Corrections for the purposes of the preparation of a pre-sentence report. When the appellant did not appear in court at 10:00 am on 19 January 2022 the Judge issued a warrant for his arrest. When the appellant subsequently appeared at 1:00 pm that afternoon the Judge declined his application for bail and remanded him in custody with sentencing rescheduled for 2 February 2022.

[20] On 19 January 2022 with the assistance of Ms Georgina o-te-whanau-Turanga, the appellant applied to the High Court at Tauranga for a writ of habeas corpus. The application was heard by Gault J on 21 January 2022 and dismissed in a reserved judgment delivered on 24 January 2022.

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20 At [203], citing *Bay of Plenty Regional Council v Faulkner* [2020] NZDC 26828 (Jurisdiction decision).
21 At [204].
22 At [214].
23 At [215][216].
24 At [216].

[21] On 28 January 2022 the pre-sentence report was filed with the Court. The sentencing on 2 February 2022 was adjourned part-heard because there was insufficient information in the pre-sentence report regarding the appellants financial circumstances and means to pay a fine. He was remanded in custody for his sentencing to be finalised on 17 February 2022.

[22] On 17 February 2022 the appellant was sentenced by the Judge to imprisonment for a term of three months and two weeks, and ordered to pay $5,000 towards the prosecutor's costs. He has since served his sentence and been released.

[23] On 24 January 2022 with the assistance of Ms Turanga the appellant filed two documents in the High Court at Tauranga. The documents are endorsed as being filed by Ms Turanga as "Kaituhi o Te Kooti o Papatuanuku, Native Court". The documents were an "Urgent Appeal Of Refusal To Grant Bail" and an "Urgent Appeal Against Conviction Out Of Time". Unfortunately, the appellant's appeal against the refusal to grant him bail was not heard prior to his sentencing hearing on 17 February 2022.[25]

[24] Both appeals were addressed in a Minute issued by Lang J on 25 May 2022 which he issued following a conference with the appellant and counsel for the respondent. In his Minute Lang J noted that events had overtaken the bail appeal as the appellant had already served his sentence of imprisonment and he accordingly made an order dismissing the bail appeal. In relation to the appellant's appeal against the convictions, Lang J directed the appellant to provide a list of the points he wishes to take on appeal, to be filed and served no later than 20 June 2022. Justice Lang further directed that the conviction appeal be re-listed for mention in the criminal call-over on 22 June 2022 at 9:00 am, and he noted that the purpose of the direction requiring the appellant to list his appeal points was to ensure that the Court understands the points the appellant wished to raise on the appeal and could then proceed to allocate a hearing date of appropriate duration having regard to the nature of the points to be raised at the hearing of the appeal.

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[25] The reasons for the delay in having the appeal heard are set out in a Minute of Moore J dated 15 February 2022.

[25] Following a further judicial conference on 29 June 2022, Lang J issued a Minute in which he noted that although the appellant had filed and served his points on appeal on 20 June 2022 in accordance with the previous directions, the Judge considered that the proposed points on appeal were not likely to be tenable. However to ensure that the appellant was given the opportunity to advance his argument, he made an order directing that he was to file and serve his submissions in support of all points on appeal no later than 24 August 2022. Justice Lang further directed that the matter was to be listed for mention in the criminal call-over on 31 August 2022 at 9.00 am for the purpose of allocating a fixture for the hearing of the appeal and to fix a time within which the respondent's submissions were to be filed and served.

[26] At the criminal call-over hearing on 31 August 2022 the appellant made an oral application for an order to stay the appeal proceeding pending. The application was dismissed by Lang J.

[27] Following the 31 August 2022 criminal call-over on Lang J issued a further Minute, in which he noted that the appellant had filed a further list of topics to be advanced on his appeal, but had not filed any accompanying submissions. Justice Lang nevertheless allocated a half day fixture for the hearing of the conviction appeal on 10 October 2022 at 2.15pm. The Judge also directed that the appellant was required to file and serve any substantive submissions no later than 26 September 2022, and said he would leave it to the respondent's counsel, Mr Hopkinson, to determine whether, and if so to what extent, he was to file written submissions in reply.

[28] Following the 31 August 2022 criminal call-over the appellant filed a document in the conviction appeal proceeding entitled: "Notice Stay in Proceedings 31st August 2022". This document appears to be a notice of motion seeking an order staying the proceeding "until a full forensic investigation is returned to Gault J (CIV2022-470-005) of the death of King George V and Queen Maud of Norway". In this document the appellant states:

> As the Constitution Act 1986, as I understand it, is not assented to by Queen Elizabeth II, note a token assent by Governor General appointed by Prime Minister is not Royal Assent;

> By discovery a break in the Constitutional authority from Te Tirity o Waitangi is identified, as the RMA binds the Crown to recognise Te Tiriti-tikanga-protected customary rights-Kaitiakitanga cf. Sections 6, 7, 8, 34 A and 269;
>
> There is not an allegation of Treason, there is an identification of Treason, by discovery of Treason affecting and effecting the creation of the RMA of the New Zealand Parliament by the removal avocatory orders in 1936 of the Sovereign outside Parliament; points of law undiscovered until 1986;
>
> A Motion to move a Stay in proceedings until outcome of Civil Appeal is known;
>
> Original proof of Claim in not yet heard in a court of competent jurisdiction to attend to Native Right. A Civil appeal is the correct Appeal process to address the miscarriage of justice and prevent further miscarriage of justice;

[29] On 28 September 2022 the appellant filed and served a document described as: "Response to Lang J Minute 31st August 2022". The document appears to be a list of matters to be raised or relied on by the appellant in support of his conviction appeal. The document sets out a lengthy and discursive list of matters without any supporting information to explain how those matters are said to relate to or affect the validity of the convictions for offending against the provisions of the RMA. A copy of this document is annexed as schedule 1 to this judgment. As can be seen, the matters listed include:

1. Breach of tikanga, customs or usage
    - Several occasions evidence in court dismissed as outside jurisdiction of District Court cf. RMA sec 269(3) and Sec 34(a).
2. Unlawful actions of Bay of Plenty Regional Council (BOPRC) *ab initio*
    - BOPRC does not have full comprehension of Native title unalienable rights inherent in the whenua cf RMA Sec 5,6, and 7.
3. A Breach of Te Tiriti of Waitangi 1840 endorsed by 544 Rangatira
    - Whenua already with crown designation cf RMA sec 7.

[30] Other matters listed are largely incomprehensible in terms of being of any possible relevance to the appeal.

[31] Apart from the "Response to Lang J Minute 31st August 2022" the appellant did not file (or serve) any other written synopsis of submissions in support of the conviction appeal. As a consequence the respondent could not respond to the

appellant's submissions and did not itself file any written submissions in relation to the appeal.

Submissions

The appellant

[32] The appellant's oral submissions generally lacked focus and were difficult to follow. As I understood him, his principal submission is that his rights as the owner or custodian of the aboriginal or native title to the land which is the subject of the charges have been disregarded and effectively ignored by the District Court Judge in her decision finding six of the charges he faced proven. He submits that his rights have been what he terms "railroaded" and his indigenous rights as owner of the whenua passed to him by his forebears have been ignored.

[33] The appellant submits that the respondent and its officers entered onto his property illegally and in doing so trespassed onto wāhi tapu where some of his ancestors are buried. The appellant was highly critical of the manner in which the respondent's officers and agents entered onto his ancestral property without respecting his rights as owner and without appropriate respect for his kaitiakitanga or guardianship of the land and recognition of the fact that they were entering wāhi tapu.

[34] The appellant presented a number of documents which he proceeded to refer to as being relevant to the validity of the convictions. One of the documents was his unsworn affidavit dated 3 September 2021 in which he covers a range of issues related to his assertion that his customary or native rights of ownership of the subject land preclude the jurisdiction of the respondent and its officers and agents from entering onto the land and preclude the respondent from prosecuting him for conducting the activities on the land that is the subject of the charges under the RMA.

[35] The documents he presented and referred to, included a document headed: "Challenge to Jurisdiction, Dated 29 February 2020" in which he had previously sought an adjournment of the proceedings in the District Court. In this document the appellant had sought disclosure pursuant to the Criminal Disclosure Act 2008 of a range of material to prove that the respondent has authority to administer the

appellant's ancestral land. The appellant submits that as the respondent has not produced the requested information and documents it has not proved that the native title pursuant to which the land he occupies was held has ever been extinguished.

[36] Another document presented by the appellant is headed: "Challenge to Jurisdiction Dated 3 September 2020". This document relates to the matter determined by Judge D A Kirkpatrick in his pre-trial ruling dated 22 December 2020 in which he dismissed the appellant's challenge to the jurisdiction of the District Court to hear and determine the eight RMA charges he was then facing.[26] Referring to this document the appellant repeated the submissions he had previously made before Judge Kirkpatrick that the land which is the subject of the prosecution for offences against the RMA was never granted by the appellant's ancestral owners of the land to the Queen, and saying that if the respondent contends that the land is under the jurisdiction of the Crown and subject to laws passed by Parliament, by reason of the effective confiscation actions of Governor Grey and Parliament, those actions were not lawful.

[37] The appellant accordingly repeats the submission he made previously in his 3 September 2020 document that:

> The land the subject of the prosecutions has never been granted to the Queen …
>
> I also argue I have the legitimate expectation, as a right of natural justice, that the land my whanau has lived on since 1835, is not able to be affected by actions of the Crown or its governmental agents/bodies, unless I am causing distress to those around the land. Such natural justice right arises from my whanau holding the land since 1835.
>
> I state it is a requirement of natural justice, the land being with my whanau since 1835, before the Treaty was signed, that tikanga, the land being at law land with aboriginal title and therefore Maori customary land, and how the Treaty applies to this land, is considered. I say if the land has any of such said legal standings it impugns the prosecution actions of the Regional Council.

[38] The appellant also produced copies of the documents listed in his points on appeal document, some of which had previously been produced as exhibits at the District Court trial including the document described as an "Intellectual Resource

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[26] Jurisdiction decision, above n 20.

Consent" dated 25 January 2019 and purporting to be issued by the "Tangatawhenua Wealth and Resource Management Authority" to the appellant as consent authorising him to undertake "earthworks mitigation for effects of global warming". In reviewing this material and other documents produced to the District Court, the appellant in effect repeated the submissions in support of the challenge he had made in the District Court regarding that Court's jurisdiction to hear and determine the charges in circumstances where the issue of native or customary title was in issue.

[39] Other documents produced by the appellant in the course of the hearing of the appeal were:

(a) "Writ of Supersedeas, Dated 24 February 2021".

(b) "Writ of Certiorari to confirm lifted indubitable facts before 12th July 2021, Dated 12th July 2021".

(c) "Motion to move to Magistrates Court, Dated 26th July 2021".

(d) "Writ of Quo Warranto, Dated 26 July 2021", naming the respondent and John Holst.

(e) "Writ of Quo Warranto, Dated 26 July 2021", naming the respondent and Stuart Standen.

(f) "Writ of Quo Warranto, Dated 1 August 2021", naming the respondent and Fiona McTavish.

(g) An unsworn affidavit appearing to be by the appellant labelled simply as, "Affidavit, Dated 3rd September 2021".

(h) "Motion to Move the Court to Prerogative, Dated 3rd September 2021".

(i) "Motion to Stay of proceedings, Dated 6th September 2021".

(j) "Notice to Produce Application for Warrant, Dated 15th October 2021".

(k) "Notice to Produce Court Order to Bay of Plenty Regional Council, 19th October 2021".

(l) "Notice for Avoidance of Doubt, Dated 27th October 2021".

(m) "Notice of Injudicable Proceedings, Dated 28th October 2021".

(n) "Writ of Habeas Corpus AD Deliberandum, Dated 28th October 2021".

(o) "Writ of Habeas Corpus AD Testificandum, Dated 28th October 2021".

(p) "Writ of Quo Warranto, Dated 28th October 2021", naming the Alexis Miller as Prosecutor.

(q) A second "Writ of Quo Warranto, Dated 28th October 2021", also naming the Alexis Miller as Prosecutor.

(r) A third "Writ of Quo Warranto, Dated 28th October 2021", naming the Alexis Miller as Prosecutor.

(s) "Notice to High Court, Writ of Prohibition Absolute to RW Muir, Registrar General of Lands, dated 2nd November 2021".

[40] The appellant submits however that his 23 points on appeal set out in his "Response" memorandum of 26 September 2022 are subsumed by and encompassed by the matters traversed in his oral submissions. And in his oral submissions in reply, the appellant submits that the miscarriage of justice he relies on is that his appeal against the District Court Judge declining his application for bail was not heard while he remained on remand in custody. He says that he is not challenging the sovereignty of Parliament, but is challenging what the respondent did in the course of investigating and prosecuting the RMA offences and the charges it brought against him, and specifically the respondent's failure to understand and apply tikanga.

The respondent

[41] Mr Hopkinson for the respondent notes that the appeal is to be determined pursuant to the provisions of s 232 of the Criminal Procedure Act 2011 (the CP Act) which provides that the first appeal court considering an appeal against the decision following a judge-alone trial must allow the appeal if satisfied that the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred, or a miscarriage of justice has occurred for any reason.[27]

[42] Mr Hopkinson notes that the appellant has not filed, presented or identified any grounds of appeal and has not made any submissions directed at the issues to be addressed pursuant to s 232 of the CP Act.

[43] Mr Hopkinson says that the respondent's evidence in the District Court clearly established that the appellant was responsible for hundreds of tons of hard fill waste being spread from the appellant's property at Matapihi Road and extending into the foreshore area of the Coastal Marine Area of Tauranga harbour. Other evidence proved that water containing faecal material from the piggery on the appellant's property was running from the property into the harbour.

[44] The respondent submits that the Judge's decision finding the six RMA charges proven followed an eight-day hearing and the presentation of substantial prosecution evidence to prove the charges. Mr Hopkinson submits that the Judge did not err in reaching her findings that the charges were proven.

[45] In response to the matters raised by the appellant in support of his appeal, Mr Hopkinson notes that there were four: the appellant's challenge to the jurisdiction of the District Court, which appears to be the appellant's principal argument; the various writs the appellant purported to issue to the respondent and its officers; the respondent's conduct in the course of the execution of the search warrant at the appellant's property; and the application of tikanga principles.

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[27] Criminal Procedure Act 2011, s 232(2)(b).

[46] Mr Hopkinson says that the issue of the jurisdiction of the District Court to hear and determine the charges was the subject of the pre-trial hearing before Judge Kirkpatrick and was determined by his judgment delivered on 22 December 2020. Counsel notes that the appellant did not appeal against Judge Kirkpatrick's ruling and he submits that accordingly this Court need not and should not consider the issue of jurisdiction in the context of this appeal.

[47] As regards the various "writs" issued by the appellant, Mr Hopkinson says that they are largely unintelligible. He notes that following the appellant filing the "Writ of Supersedeas" dated 24 February 2021, the respondent filed a memorandum in the District Court noting that Judge Kirkpatrick's decision had already determined the challenge to jurisdiction referred to in the document. He further notes that while a writ of supersedeas is a procedure available in the United States of America, it is not a procedure available within the laws of New Zealand. Mr Hopkinson says that the various "Writ(s) of Quo Warranto" referred to by the appellant were filed by the appellant and served on the respondent and individuals named in it after the hearing in the District Court had concluded. He submits that they are not relevant to the appeal.

[48] In response to the appellant's submissions regarding the respondent's execution of the search warrant and its manner of entering upon the property to conduct a search, Mr Hopkinson notes that the appellant did not challenge the validity of the search warrants or the searches conducted pursuant to the warrants at the hearing in the District Court. Counsel notes that s 332(1) of the RMA contains the power authorising enforcement officers to enter onto a property at a reasonable time to inspect it in order to determine whether there is compliance with the applicable plan, or resource consent, which includes the power to take samples of water, soil, or any organic matter. Counsel notes that in the present case the respondent applied to the District Court pursuant to s 334 of the RMA for search warrants which were granted and subsequently executed. And in accordance with s 335 of the RMA, police officers accompanied the respondent's staff when they entered the appellant's property to execute the search warrants. Counsel further notes that no issue was taken by the appellant with the actions of the respondent's staff or the police during their execution of the search warrants, and the issue of the search involving an area of wāhi tapu was

not raised at the time or during the trial in the District Court. Mr Hopkinson says that the taking of water samples by the respondent's staff or agents related to the water flowing from the piggery into the harbour and it did not involve any digging or removal of soil.

[49] Mr Hopkinson concluded by noting in his oral submissions that the appellant had not made any reference to a number of the "appeal points" contained in his list dated 26 September 2022 which he was required to file pursuant to Lang J's direction of 31 August 2022.

The appeal

[50] The CP Act provides for a right of appeal against conviction.[28] The appellate court must allow the appeal if it is satisfied that a miscarriage of justice has occurred for any reason.[29] A miscarriage of justice means any error, irregularity, or occurrence affecting the trial that has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial, or a trial which is a nullity.[30]

Discussion

[51] Although the appellant submits that the miscarriage of justice on which his appeal against conviction is based is that his appeal against the District Court's refusal to grant bail was not heard and determined during the period when he was being held in custody awaiting sentence, that is something that happened after the Judge had already delivered her decision finding him guilty, and after convictions on the charges had been entered. It is therefore not a matter that could possibly have affected the validity of the Judge's decision finding him guilty of the charges.

[52] However as I have noted, the appellant's oral submissions were centred on the proposition that the respondent did not have the legal authority to enforce the provisions of the RMA in respect the appellant's land at Matapihi. In support of that

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28 Criminal Procedure Act, s 229(1).
29 Section 232(2)(c).
30 Section 232(4).

submission, the appellant referred to the documents listed in his points on appeal, copies of which he provided to the Court at the commencement of his submissions.

[53] In most cases these documents are dated on dates falling during the District Court trial or on dates following the trial but prior to Judge Steven delivering her judgment on 4 November 2022. Although they contain a discursive range of allegations and obscure legal contentions, they all appear to be related to or derive from the appellant's claim that the respondent did not have jurisdiction to investigate or prosecute the appellant in relation to his activities conducted on his property. For example, in his Writ of Supersedeas[31] dated 24 February 2021, the appellant states:

> 1. I tio o te whanau falkner hereby invoke Common law by way of Writ of Supersedeas, possessing a more perfect history, to cease and desist proceedings ('this work must be superseded by a more perfect history') and motion the court to strike out charges for want of jurisdiction,
>
> …
>
> 8. I therefore give this court notice that;
>
> > 1. To evade my inherent right lore in favour of RMA 1991 statute interpretation as LAW, is deemed repugnant and will be addressed in a Hapu Paa Kooti recorded in Te Kooti o Papatuanuku Native Court ki Waiariki cf. 'International Native Aboriginal Court of Justice'
> >
> > 2. i: am; 'Native Inherent Authority' in, on, over and above said whenua taonga tukuiho: interpreted by the fictitious person assuming authority; BOP DISTRICT COUNCIL as said LANDS.
>
> …
>
> FACT OF THE MATTER
>
> 11. I require "proof of claim" that the BAY OF PLENTY REGIONAL COUNCIL (BOPRC) has authority to administer usage upon taonga-tukuiho, my ancestral land; and
>
> …
>
> 19. The ruling of Judge DA Kirkpatrick is limited to Acts of Parliament not lore/law of the land.
>
> ORDER

[31] An application or petition to the court for a writ of supersedeas is a legal procedure available in the United States of America by which a party applies for an order for a stay of proceedings or enforcement of a judgment or order pending the determination of an appeal. The equivalent in New Zealand is an interlocutory application pursuant to r 20.10(2) of the High Court Rules 2016 for a stay of enforcement of a judgment pending determination of an appeal.

> 20. I move the Court to Discharge this matter on the grounds that by admittal, Environmental [sic] Court are an administration venue with jurisdiction under the RMA 1991 ONLY therefore, lack competent jurisdiction to hear matters of tikanga customary lore.
>
> 21. I move the Court to uphold Cease and Desist Notice on BOPRC in above paragraph 1.

[54] The Writs of Quo Warranto naming the respondent and members of its staff in each case challenged the authority of the respondent and the named staff members' warrants of authority from the respondent to act on its behalf. The "Writ of Habeas Corpus Ad Deliberandum", purported to direct the respondent's prosecutor to produce the author of the warrants relating to the searches of the Matapihi property on 4 October 2019 and 12 August 2020. And the "Writ of Prohibition Absolute" naming the Registrar-General of Lands dated 2 November 2021 referred to an relied on "Prerogative" powers to direct the Registrar-General of Land to prevent certain land from falling into "the jurisdiction of the Land Transfer Acts of the General Assembly of New Zealand". The subject land being described as: "Any recorded interest registered as Māori freehold Land Shall remain as defined prior to any registration of interest – as absolute;" and "To Bind the Crown to the Fact of the Land being in original right; common absolute unalienable".

[55] As this brief summary shows, none of the documents produced and relied on by the appellant in the course of his oral submissions at the hearing of the appeal, directly address or relate to the 23 points on appeal set out by the appellant in his "Response to Lang J Minute 31 August 2022" document dated 26 September 2022. Neither do these documents or the appellant's oral submissions referring to them directly address the issue of whether, and if so how, the Judge erred in her findings that the charges were proven beyond reasonable doubt.

Challenge to jurisdiction

[56] In his pre-trial ruling dismissing the appellant's challenge to the jurisdiction of the District Court to hear and determine the RMA charges, Judge Kirkpatrick said:[32]

> [20] The argument advanced by Mr Faulkner in relation to title to the land, raupatu or confiscation and subsequent grants of title is not relevant to any of

[32] Jurisdiction decision, above n 20.

> the charges that he faces. I respectfully agree with the previous ruling of his Honour Judge Smith that the issues of ownership or title do not affect any element of the offences under the RMA. All of the charges relate to things allegedly done by Mr Faulkner which contravened the relevant provisions of the RMA stated in each charge and for which he had no lawful authority. Issues of grant, cession or confiscation are not relevant to those charges.
>
> [21] In relation to his second argument, without accepting that Mr Faulkner has any legitimate expectation in respect of these charges or that there has been any breach of natural justice, I consider that these charges do raise issues concerning the causing of distress to those around the subject land. Such distress arises at least insofar as the statutory provisions of the RMA and the relevant plan rules address the control of adverse effects on the environment. Whether there has in fact been any distress caused will be a matter for evidence at a trial.
>
> [22] In relation to the third argument, the references to aboriginal title and status as customary land are closely related to the first argument and are answered in the same way. In terms of tikanga, I note that under s 269(3) of the RMA the Environment Court is required to recognise tikanga Māori where appropriate, but there is no comparable provision in either the Criminal Procedure Act 2011 or the District Court Act 2016. Under those Acts of Parliament there is therefore no basis on which to argue that tikanga can displace an Act of Parliament. Even so, I fully accept that principles of natural justice from important elements of the common law, to be borne in mind and applied, subject to any relevant statutory provision, in every proceeding before a court. In that sense, at least, tikanga and the common law are conceptually closely related.

[57] I note that in her judgment of 4 November 2022 Judge Steven addressed the appellant's challenge to Judge Kirkpatrick's and Judge Smith's pre-trial rulings regarding the District Court's jurisdiction to hear and determine the charges, and said that as neither of those rulings had been appealed by the appellant, the rulings could not be relitigated in the proceedings.[33] And as I noted earlier, the respondent submits that as Judge Kirkpatrick's decision was not appealed by the appellant this Court now hearing his appeal against conviction need not consider the issue of the District Court's jurisdiction determined by Judge Kirkpatrick's ruling.

[58] However the rights of appeal against certain pre-trial decisions in judge-alone cases created by s 215 of the CP Act are restricted to appeals against those decisions coming within the terms of s 215(2). That section does not confer a right of appeal on

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33 District Court judgment, above n 1, at [14].

the appellant enabling him to seek leave to appeal Judge Kirkpatrick's decision as to jurisdiction.[34]

[59] I accordingly find that this Court is not precluded from considering and determining whether Judge Kirkpatrick's pre-trial ruling is correct in the context of the appellant's appeal against conviction.

[60] Unfortunately the appellant has not made submissions specifically directed at the issue of whether Judge Kirkpatrick's ruling is correct in law. As I have said, the focus of his submissions has been as to the legal authority and jurisdiction of the respondent to investigate and prosecute him in respect of activities carried out by him or permitted by him in respect of the Matapihi Road property which he and his forebears have occupied since 1835. The Court is accordingly left in the somewhat unsatisfactory position of not having heard submissions from the parties on the issue.

[61] Nevertheless, and for the reasons set out by Judge Kirkpatrick in his ruling,[35] I am satisfied that the respondent is constituted by the Local Government (Bay of Plenty Region) Reorganisation Order 1989, and recognised as a regional council in Part 1 of Schedule 2 to the Local Government Act 2002. Pursuant to s 30 of the RMA the respondent has the general functions set out in s 30(1) and specifically in relation to any coastal marine area in its region relevantly as follows:

> **30 Functions of regional councils under this Act**
>
> (1) (d) in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—
>
> (i) land and associated natural and physical resources:
>
> (ii) the occupation of space in, and the extraction of sand, shingle, shell or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:
>
> (iii) …
>
> (iv) discharges of contaminants into or onto land, air, or water and discharges of water into water:

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[34] See Simon France (ed) *Adams on Criminal Law – Procedure* (online ed, Thomson Reuters) at [CPA 215.01].

[35] Jurisdiction decision, above n 20, at [16][25].

[62] The respondent as a regional council is a "consent authority" as provided in s 2 of the RMA whose permission is required to carry out any activity for which a resource consent is required under the RMA. Section 84(1) of the RMA requires the respondent to observe and enforce the provisions of its operative policy statement and plan, and the CP Act provides that any person may commence a criminal proceeding by filing a charging document in the office of the District Court nearest to where the offence is alleged to have occurred.[36] I accordingly find that the respondent has the statutory power and responsibility of carrying out an investigation as to possible breaches of the RMA by the appellant and the power to enforce the provisions of the RMA by charging and prosecuting the appellant in respect of the breaches of the RMA it alleged he is responsible for.

[63] Section 8 of the RMA provides:

> **Treaty of Waitangi**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[64] I respectfully agree with Judge Kirkpatrick's observation that there is no principle of Te Tiriti o Waitangi/the Treaty of Waitangi that any Act of Parliament is not binding on any person in New Zealand, whether they be Māori or non-Māori. All persons in New Zealand are subject to the rule of law meaning that everyone is subject to the laws enacted by Parliament in the same way. The principles of the Treaty whereby the relationship between the Crown and Māori has the nature of a partnership requiring good faith, equity and equal treatment, do not provide or indicate otherwise.[37] Both the terms and the principles of the Treaty, where they legally bind the Crown, may give rise to legal obligations in relation to tikanga.[38] While there is a generally accepted presumption that statutes are to be interpreted consistently with the Treaty as far as possible,[39] in the present context the application of Treaty principles

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36 Criminal Procedure Act, ss 1415.

37 The principles of the Treaty were obligations first established in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

38 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [587].

39 *Ellis v R* [2022] NZSC 114, at [98] and [117] per Glazebrook J. See also at [175][176] per Winkelmann CJ, [257] and [265] per Williams J and [280] per O'Regan and Arnold JJ.

and tikanga is appropriately undertaken under and within the scope of the statutory scheme. Other provisions of the RMA support this conclusion. Section 6 of the RMA relevantly provides:

> **Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it ... shall recognise and provide for the following matters of national importance:
>
> (a) the preservation of the natural character of the coastal environment (including the coastal marine area) …
>
> …
>
> (5) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

[65] And s 7 of the RMA relevantly provides:

> **Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –
>
> (a) kaitiakitanga:
>
> (aa) the ethic of stewardship:
>
> …
>
> (4) intrinsic values of ecosystems:
>
> …

[66] These other provisions make it clear that the relationship of Māori with their ancestral lands, water, wāhi tapu, taonga and kaitikitanga in respect of their lands, are matters that must be taken into account and given recognition by all persons exercising functions or powers under the RMA. By mandating that these matters be recognised, provided, and had regard to, by all persons exercising functions or powers under the Act, the RMA can clearly be seen to be stipulating that they are matters that fall within the scope of the RMA, leaving no room for the appellant's contention that his property at Matapihi, and his activities on the land and affecting the adjacent inter-tidal coastal area, are beyond or outside the scope of the RMA.

[67] I accordingly reject the appellant's submission that the respondent does not have jurisdiction to carry out its functions under the RMA in relation to the appellant's activities regarding the property at Matapihi.

Evidential challenges

[68] It is clear from Judge Steven's decision that the evidence presented to the District Court by the respondent and accepted by the Judge comprised a compelling evidential foundation for the Judge's findings regarding the charges being proved beyond reasonable doubt. The appellant has not established that the Judge erred in her assessment of the evidence so that a miscarriage of justice resulted.

Conclusion

[69] For the reasons set out above I find that the appellant has failed to show that the Judge made an error in her decision finding him guilty of the charges, and has failed to show that a miscarriage of justice has occurred for any other reason, or that there is a risk that the trial was unfair or a nullity.

Result

[70] The appeal against conviction is dismissed.

_____

Paul Davison J

SCHEDULE 1

To: The Registrar of the High Court at Tauranga
Bay of Plenty Regional Council (BOPRC) PERSON/RESPONDENT
Lang J High Court Decision 31st August 2022

This document notifies you that -

Supporting information to list of the points requested by Lang J without limiting to:

1. Breach of tikanga, customs or usage
   Several occasions evidence in court dismissed as outside jurisdiction of District Court cf. RMA sec 269 (3) and Sec 34 (a)
2. Unlawful actions of Bay of Plenty Regional Council (BOPRC) *ab initio*
   ,BOPRC does not have full comprehension of Native title unalienable rights inherent in the whenua cf. RMA Sec 5, 6, and 7
3. A Breach of Te Tiriti of Waitangi 1840 endorsed by 544 Rangatira
   Whenua already with crown designation cf. RMA Sec 7
4. Rebut The Treaty of Waitangi
   Te Tiriti is law of the land
5. Miscarriage of Justice is at hand of a captive jurisdiction
   Oath of District Court and Environment Court Judges clearly state that judges are bound by Parliament of New Zealand
6. Breach of Lawful Remedy
   RMA Sec 42 (l)a
   Evidence filed
7. NEW ZEALAND CROWN ACTS legislating captive jurisdiction void of equitable remedy
   Evidence filed
8. A lache of man
   Negligence in judicial process
9. Justice Delayed is justice denied
10. First in time is best in law
11. Customs supersedes common law
    9, 10 and 11: Legal maxims
12. Warrants of Council officers unsubstantiated
13. Search Warrants unsubstantiated
14. Warrants of Police unsubstantiated
    12, 13 and 14: Origin of Warrants not provided
    Cf RMA Sec 22
    Cf RMA Sec 34 (a) 1 (a)
    RMA Interpretations Sec 2
15. Use of arms a breach of Peace after Battle of Gate Pa
    BOPRC entered whenua with armed operatives, finger on trigger, safety off
16. High Treason
    Crown acknowledgement broken by BOPRC
17. No Peace is broken
18. No offences against the peace occurred
19. No injury is committed
    17, 18 and 19: UK Common Law
20. Judged without evidence as Writs were not addressed to bring evidence for consideration
    Writs unattended to

21. Claim of Wrong Doing
    Evidence substantiated that Officers actions in breach of Resource Management Act (RMA) of Sec 34 (a)
22. Courts of mixed jurisdiction
    District Court and Environment Court jurisdictions mixed
23. Writs unaddressed in a court of competent jurisdiction, All records filled in Court and not responded to:
    a. Writ of Supersedeas
    b. Writ of Subiicendum
    c. Writ of Certiorari
    d. Writ of Quo Warranto BOPRC Officers
    e. Writ of Mandamus Nisi BOPRC
    f. Writ of Prohibition Absolute RW Muir
    g. Writ of Prohibition Absolute BOPRC
    h. Writ of Mandamus to recognise High Court
    i. Writ of Habeas Corpus Ad Deliberandum
    j. Writ of Quo Warranto Police
    k. Writ of Quo Warranto Quo Jure to Court
    l. Writ of Habeas Corpus Ad Testificandum
    m. Notice of Prerogative Takes Precedence
    n. Notice of Injudicable Proceeding

Summary

Original proof of Claim is not yet heard in a court of competent jurisdiction to attend to Native Right;

Court of competent Jurisdiction is not identified;

A Civil appeal is the correct Appeal process to address the miscarriage of justice and

Prevent further miscarriage of justice;

Appeal of Lang J decision is not yet heard;

Tio

26th September 2022

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2020-470-31
[2021] NZHC 1201

BETWEEN	TAURANGA ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED Appellant
AND	TAURANGA CITY COUNCIL and BAY OF PLENTY REGIONAL COUNCIL Respondents
	TRANSPOWER NEW ZEALAND LIMITED Applicant for consent

Hearing:	3-4 September 2020
Appearances:	J D K Gardner-Hopkins for the appellant and the Maungatapu Marae Trustees as an interested party M H Hill and R M Boyte for the respondents A J L Beatson, J P Mooar and E M Taffs for the applicant for consent Appearance excused for Ngāi Tūkairangi Trust, an interested party
Judgment:	27 May 2021

JUDGMENT OF PALMER J

This judgment was delivered by me on Thursday 27 May 2021 at 2.00 pm.
Pursuant to Rule 11.5 of the High Court Rules.

……
Registrar/Deputy Registrar

Counsel/Solicitors:
J D K Gardner-Hopkins, Barrister, Wellington
Sharp Tudhope Lawyers, Tauranga
Cooney Lees Morgan, Tauranga
Bell Gully, Wellington
Lara Burkhardt, Mt Maunganui

Contents

Summary

[1] Ngati Hē was dispossessed of most of its ancestral lands but retains the Maungatapu Marae and beach at Rangataua Bay, on Te Awanui Tauranga (Tauranga Harbour). Ngāti Hē has a long-standing grievance about the location of electricity transmission lines across the Bay from the Maungatapu Peninsula to the Matapihi Peninsula. Some of the transmission poles will require replacement soon. In 2016, to address Ngāti Hē's grievance, Transpower initiated consultation with iwi about realignment of the transmission lines, including at Rangataua Bay. Ngāti Hē supported removal of the existing lines and initially did not oppose their proposed new location. But when it became clear that a large new pole, Pole 33C, would be constructed right next to the Marae, Ngāti Hē concluded the proposed cure would be worse than the disease and opposed the proposal. Consents were granted for the proposal realignment which the Environment Court upheld.[1] The Tauranga Environmental Protection Society Inc appeals the decision of the Environment Court, supported by the Maungatapu Marae Trustees from Ngati Hē.

[2] I uphold the appeal. I find:

(a) The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law.

(b) Proper application of the law requires a different answer from that reached by the Environment Court. When the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the Outstanding Natural Features and Landscapes (ONFL), it is not open to the Court to decide it would not.

(c) The Court erred in law in applying an "overall judgment" approach to the proposal and in its approach to pt 2 of the Resource Management

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1 *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2020] NZEnvC 43 [Environment Court] at [218].

Act 1991 (RMA). The Court was required to carefully interpret the meaning of the planning instruments it had identified (the Bay of Plenty Regional Coastal Environment Plan (RCEP) in particular) and apply them to the proposal.

(d) The relevant provisions of the RCEP do not conflict and neither do the provisions of the higher order New Zealand Coastal Policy Statement (NZCPS) and the National Policy Statement on Electricity Transmission (NPSET). There are cultural bottom lines in the RCEP:

(i) Policy IW 2 requires adverse effects on Rangataua Bay, an "area of spiritual, historical or cultural significance" to Ngāti Hē, to be avoided "where practicable".

(ii) Policy NH 4, NH 5(a)(ia) and NH 11(1) require the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 to be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

(e) Determining whether the exceptions to the cultural bottom lines apply requires interpretation and application of the "practicable", "practical" and "possible" thresholds. The Court erred in failing to recognise that this determines whether the proposal could proceed at all. The technical feasibility of alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. On the basis of the Court's existing findings, Policy NH 11(1)(b) is therefore not satisfied and consideration providing for the proposal under Policy NH 5 is not available.

[3] These are material errors. I quash the Environment Court's decision. But I consider it desirable for the Environment Court to further consider the issues of fact relating to the alternatives. With goodwill and reasonable willingness to compromise

on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal. And, if the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. I remit the application to the Environment Court for further consideration consistent with this judgment.

The application for consents in context

Ngāti Hē and te Maungatapu Marae

[4] Ngāti Hē is a hapū of Ngāi Te Rangi. After the battles of Pukehinahina (Gate Pā) and Te Ranga in 1864, much of Ngāi Te Rangi's land was confiscated for settlement under the New Zealand Settlements Act 1863 and Tauranga District Lands Act 1868.[2] The confiscations were then reviewed by Commissioners and land was returned.[3]

[5] The confiscated land included that of Ngāti Hē at Maungatapu, a peninsula in the south of Te Awanui Tauranga (Tauranga Harbour), jutting into Rangataua Bay. In 1884, the Crown "awarded" back to Ngāti Hē two blocks of land on Maungatapu peninsula, some three kilometres east of central Tauranga.[4] Block 2 was part of the tip of the Maungatapu peninsula. Ngāti Hē has since lost part of that land too. Some was taken for the public purposes of putting in a motorway and electricity transmission lines. Some was subject to forced sale, because Ngāti Hē was unable to pay rates, and then sub-divided.[5] As stated in the agreed Historical Account in the Deed of Settlement between Ngāi Te Rangi and the Crown, upon which the Crown's acknowledgement and apology to Ngāi Te Rangi was based:[6]

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2 *Ngāi Te Rangi and Ngā Pōtiki Deed of Settlement of Historical Claims* (14 December 2013) [Deed of Settlement], cl 2 (CBD 303.0702 and 303.0703). The Deed is conditional upon settlement legislation coming to force, which has not yet occurred.

3 See generally Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at chs 4 and 10.

4 Maungatapu 1 and 2 Blocks. Commissioner Brabant "Land Returned to Ngaiterangi Tribe Under Tauranga District Land Acts" [1886] AJHR G10; Heather Bassett *Aspects of the Urbanisation of Maungatapu and Hairini, Tauranga* (July 1996) at 6 (CBD 301.0024); and Des Heke *Transpower Rangataua Realignment Project: Ngāti Hē Cultural Impact Assessment* (September 2017) at 6 (CBD 304.0966).

5 Deed of Settlement, above n 2, cl 2.71.

6 Clause 2.72.

> The Maungatapu subdivision contributed to the reduction of Ngāti He landholdings on the peninsula to 11 hectares by the end of the twentieth century. Maungatapu was once the centre of a Ngāti He community who used their lands for gardens, but now the hapū only maintains the marae and headland domain, along with a small urupā.

[6] Amongst the Crown's many acknowledgements in the Deed, it acknowledged:

(a) public works, including "the motorway and infrastructure networks on the Maungatapu and Matapihi Peninsulas", have had "enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi";[7]

(b) "the significant contribution that Ngāi Te Rangi . . . [has] made to the wealth and infrastructure of Tauranga on account of the lands taken for public works";[8] and

(c) "the significance of the land, forests, harbours, and waterways of Tauranga Moana to Ngāi Te Rangi . . . as a physical and spiritual resource".[9]

[7] As stated in evidence in this proceeding:[10]

> The result of all these forms of alienation has been that very little land in Maungatapu and Hairini is still owned by Māori. There are a handful of reserve areas, such as marae and urupā, and some families live in the area on their individual sections. The traditional rohe of Ngāti Hē and Ngāi Te Ahi now has the overwhelming characteristics of a well populated residential suburb, in which there is less scope for Māori interests and activities to be promoted than there was in the past.

[8] The Maungatapu Marae (the Marae) of Ngāti Hē , also called Opopoti, is on the northern tip of the Maungatapu peninsula.[11] The wharenui, Wairakewa, and wharekai, Te Ao Takawhaaki, look to the northeast, towards the bridge and Matapihi peninsula. Te Kōhanga Reo o Opopoti is established on the eastern side of the Marae, between the Marae and a health facility next to State Highway 29A. To the west of

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7 Clauses 3.15 and 3.14.5.
8 Clause 3.16.1.
9 Clause 3.18.1.
10 Bassett, above n 4, at 6 (CBD 301.0024).
11 Environment Court, above n 1, at [10].

the Marae is a large flat area that was Te Pā o Te Ariki and is now Te Ariki Park, home to the rugby field, tennis/netball courts and clubrooms of Rangataua Sports and Cultural Club. The land on which the Club is situated is a Maori reservation managed by Ngāti Hē.[12]

Ngāi Tūkairangi

[9] Ngāi Tūkairangi, another hapū of Ngāi Te Rangi, has a marae and other land on the Matapihi headland.[13] Te Ngāio Pā, near the southern tip of the Matapihi Peninsula, is associated with Ngāi Tūkairangi, Ngāti Hē, Ngāti Tapu, and Waitaha.[14] Approximately 60 hectares in Matapihi is owned by over 1,470 Ngāi Tūkairangi or Ngāti Tapu landowners.[15] The Ngāi Tūkairangi No 2 Orchard Trust has managed orchard land in the area since 1992.[16]

The A-line

[10] In the 1950s, the Maungatapu 2 block was implicated in plans for a motorway and a new electricity transmission line.[17] In 1958, the Maungatapu 2 block, including the beach in front of it, was reserved as a marae and recreation area under s 439 of the Māori Affairs Act 1953.

[11] Also in 1958, the Ministry of Works, a department of the Crown, constructed the "A-line", an electricity transmission line. It is located very near Ngāti Hē's remaining land. It is supported by poles in Rangataua Bay and passes over some 40 private residences and above the playing fields of Te Ariki Park. Ngāti Hē complained but the Ministry took the position that there was no alternative route for the power lines.[18] The Crown Law Office has acknowledged that the electricity department did not properly inform those affected.[19] The Crown acknowledged in the

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12 Heke, above n 4, at 15 (CBD 304.0975).
13 Environment Court, above n 1, at [28].
14 At [29].
15 Brief of Evidence of Peter Te Ratahi Cross, (25 March 2019) [Cross Brief] at [7] (CBD 202.0388).
16 Environment Court, above n 1, at [188].
17 Bassett, above n 4, at 10 (CBD 301.0030).
18 At 11 (CBD 301.0032).
19 Rachael Willan *From Country to Town: A Study of Public Works and Urban Encroachment in Matapahi, Whareroa and Mount Maunganui* (December 1999) at 85 (CBD 301.0081).

Treaty settlement that it did not send notices to all the owners of land taken, which may have been why Ngāti Hē owners did not apply for compensation within the required timeframe.[20] Ngāti Hē's concerns about the location of the A-Line infrastructure were included in their claim to the Waitangi Tribunal in 2006.[21] The claim referred to the absence of compensation for, or adequate notification of, the construction of the power lines.

[12] The power lines were also placed through the middle of Ngāi Tūkairangi's land, despite the hapū's opposition.[22] The A-Line went directly over Te Ngāio Pā on the southern tip of the Matapihi peninsula. The effect of the A-line on the use and development of horticultural lands at Matapihi was also the subject of Treaty of Waitangi claims to the Waitangi Tribunal by Ngāi Tūkairangi in 1988 and 1997.[23] These claims also concerned the construction of the power lines without compensation nor adequate consultation.[24]

[13] In 1959, a bridge was constructed from the northern end of the Maungatapu peninsula to the southern end of the Matapihi peninsula. This is now State Highway 29A, to Mt Maunganui. Construction substantially altered the site of Te Pā o Te Ariki of Ngāti Hē, disturbing an ancient urupā and exposing bones.[25]

The B-line

[14] Under the State-Owned Enterprises Act 1986, the electricity assets of the Ministry of Works were transferred to the Electricity Corporation of New Zealand. In 1991, the electricity transmission assets were further transferred to Transpower, the SOE which still manages the national grid. In mid-1991, work began on a second transmission line to Mt Maunganui and Papamoa. In 1993, Transpower undertook a feasibility study for erecting a new line along the Maungatapu to Matapihi portion of

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20 Deed of Settlement, above n 2, cl 2.54.

21 Environment Court, above n 2, at [44]; and Waitangi Tribunal *Tauranga Moana: Report on the Post-Raupatu Claims Volume 1* (Wai 215, 2006).

22 Cross Brief, above n 15, at [10].

23 Environment Court, above n 1, at [44]; and Hikitapua Ngata *Transpower Line Realignment Project: Ngai Tūkairangi Hapu Cultural Impact Assessment* at 10 (CBD 304.1008). Wai 211 was heard as part of the foreshore and seabed inquiry. Wai 688 was heard as part of the Kaipara inquiry.

24 Ngata, above n 23, at 10 (CBD 304.1008).

25 Bassett, above n 4, at 13 (CBD 301.0034); and Deed of Settlement, above n 2, cl 2.56.

the state highway.[26] That would enable the A-line to be removed. The B-line was constructed in 1995. It crosses Rangataua Bay through a duct underneath the Maungatapu-Matapihi bridge and underground on the approaches at each end of the bridge.[27] Ms Raewyn Moss from Transpower confirms the resulting expectation:[28]

> … When the B-line was constructed in 1995, there was an expectation at the time that the A-line would eventually be re-aligned onto the B-line. I understand that Ngāti Hē, Ngāi Tūkairangi, Māori trustee land owners also share this expectation. This has been the subject of discussion between the parties and Transpower over many years.

The realignment proposal

[15] The A-Line has not yet been moved. Now, the condition of Poles 116 and 117, located in Te Ariki Park, is deteriorating and the poles need to be replaced. In particular, Pole 117 is close to the edge of the cliff above the harbour and recently required temporary support to protect it from coastal erosion.[29] Tower 118, situated in Rangataua Bay, is due for major refurbishment in the next 10 years.[30]

[16] Recently, Transpower developed a realignment proposal that would remove Poles 116 and 117 and Tower 118 from Rangataua Bay. Instead, aerial lines would extend between two new steel monopoles, Pole 33C on Maungatapu, at a height of approximately 34.7 metres, and Pole 33D at Matapihi, at a height of approximately 46.8 metres. The lines would no longer pass over Ngāti Hē land or private residences at Maungatapu or over Ngāi Tūkairangi land at Matapihi. This is depicted in the illustration below, with the red lines and poles to be removed, the green lines and poles to be added and the blue lines and poles to be retained.[31]

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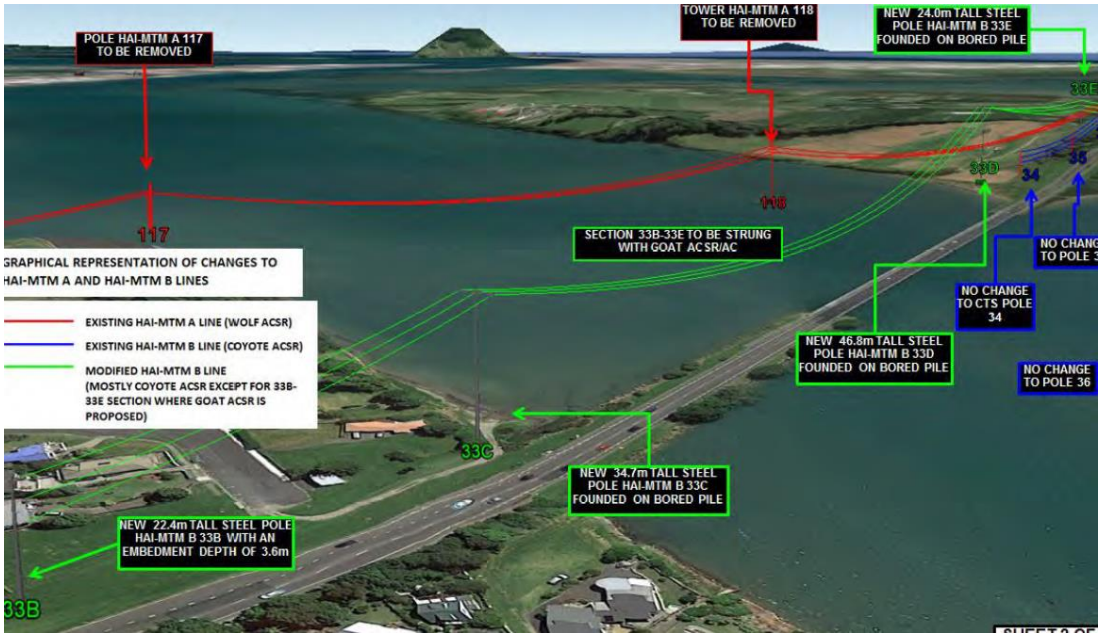
26 Willan, above n 19, at 79 (CBD 301.75).
27 Environment Court, above n 1, at [42].
28 Notes of Evidence of Environment Court [NOE] 15/9–14 (CBD 201.0015).
29 Environment Court, above n 1, at [40].
30 At [42].
31 Transpower *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Tauranga* (July 2017) at Sch A.1 (CBD 304.1103).



[17] Transpower's objectives for this project, set out in its Assessment of Effects on the Environment, are to:[32]

> a) Enable Transpower to provide for the long-term security of electricity supply into Mount Maunganui;
>
> b) Remove an existing constraint from an important cultural and social facility for the Maungatapu community; and from horticultural activities for the Matapihi community; and
>
> c) Honour a longstanding undertaking to iwi and the community to remove Tower 118 from the harbour.

[18] From March 2013, Transpower discussed the project with Ngāti Hē and Ngāi Tūkairangi, among others.[33] The proposal was a "welcome surprise" to Ngāi Tūkairangi, which supports it.[34] Removal of the lines will allow more flexible farming practices, use of shelter planting and reconfiguration of the orchard.[35]

[19] Ngāti Hē and the Marae also initially supported the proposal. But once the applications were notified, and Ngāti Hē and the Marae realised the size, nature and

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32 Transpower *Assessment of Effects on the Environment: Realignment of the HAI-MTM-A Transmission Line, Maungatapu to Matapihi including Rangataua Bay, Tauranga* (24 October 2017) at 8 (CBD 304.0784).

33 Environment Court, above n 1, at [47].

34 At [12].

35 At [14].

location of the new Pole 33C, directly adjacent to the entrance to the Marae, they opposed it. A mock-up of the view of Pole 33C from the Marae is depicted below.[36]

The application and Council decisions

[20] In 2017, Transpower applied for the required resource consents for the proposal from the Tauranga City Council and the Bay of Plenty Regional Council (the Councils):[37]

(a) From the Tauranga City Council under the National Environmental Standards for Electricity Transmission Activities (NESETA) regulations for relocation of support structures, removal of willow and other vegetation and construction of the additional poles.

(b) From the Bay of Plenty Regional Council for earthworks, disturbance of contaminated land, drilling of foundations below ground water, modification of wetland, disturbance of the seabed and occupation of the coastal marine area airspace.

[21] Section 2 of the RMA defines the "coastal marine area" to mean "the foreshore, seabed, and coastal water, and the air space above the water", up to the line of mean high water springs.

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36 *Transpower Hairini to Mount Maunganui Re-Alignment: Landscape and Visual Graphics, Attachments to the Environment Court Evidence of Brad Coombs* (30 January 2018) at 39 (CBD 202.0514).

37 Environment Court, above n 1, at [50], Table 1.

[22] The Councils each appointed an independent hearing commissioner to consider and decide the consent applications. On 23 August 2018, the commissioners jointly decided to grant land use consents to realign the A-Line, subject to various conditions.

Appeal to the Environment Court

[23] The Tauranga Environmental Protection Society (TEPS) is an association of 14 people whose views of the harbour after realignment would be impacted by the new powerlines or poles and who made submissions opposing the application. TEPS appealed to the Environment Court. The trustees of the Maungatapu Marae, Ngāi Tūkairangi Hapū Trust, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Mr Luke Meys joined the appeal as parties under s 274 of the RMA:

(a) The Marae supported removal of the A-Line, as the subject of their long-held grievance and a danger to users of the Sports Club. But the Marae opposed the new poles and lines. Ngāti Hē would rather wait longer to get the right result.

(b) Similarly, Ngāi Te Rangi supported removal of the A-Line and its relocation. It opposed the method by which the realignment would cross Rangataua Bay.

(c) Ngāi Tūkairangi conditionally opposed the appeal on the basis it would delay the removal of transmission infrastructure on Matapihi land, which would have positive cultural and other effects for them.[38] However, if the appellants' concerns could be met through changes within the scope of the application, Ngāi Tūkairangi would wish to consider that.

(d) Mr Meys, whose property is under the existing A-Line, supported the proposal, with urgency, and opposed the appeal.

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38 At [16]–[17].

The Environment Court decision

[24] The Court refused the appeal and amended the conditions of consent.[39] The structure of its decision was to:

(a) identify the background to, and nature of, the proposal and consent application;

(b) outline the legal framework and the relevant policies and plans;

(c) identify three preliminary consenting issues: bundling; alternatives; and maintenance or upgrade;

(d) consider the cultural effects of the proposal;

(e) consider the effects on the natural and physical environment; and

(f) consider and amend the conditions of the consents.

[25] In its conclusion, the Court observed that neither the Councils nor the Court on appeal "have the power to substantially alter Transpower's proposal or to require any third party, such as the New Zealand Transport Authority, to participate in the proposal".[40] It said "[i]f we consider that the proposal, essentially as applied for, is inappropriate, then we may refuse consent".[41] In summary, the Court in its concluding reasoning:

(a) Found the removal of the A-Line will result in positive effects for all people, land and water and for Ngāti Hē and Ngāi Tūkairangi.[42]

(b) Noted it had found the proposal is a single one and its elements should be considered together.[43]

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39 At [271]–[272].
40 At [260].
41 At [260].
42 At [261].
43 At [262]–[263].

(c) Held that the proposed relocation "does not result in wholly positive effects" and it must have regard to Policy 15 of the NZCPS because the "location is not ideal". In particular, placing the line above the bridge with the associated tall poles "creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A".[44]

(d) Found the alternatives of laying the A-Line on or under the seabed, or in ducts attached to the bridge, "appear from the evidence to be impracticable", though they are technically feasible, because of the cost.[45] The Court does not have the power to require Transpower to amend the proposal.

(e) Found "[t]he character or nature of the effects at the heart of this case are essentially those that relate to restrictions on using land, visual impact and the imposition of the works on sites of significance to Māori."[46] The positive effects of removal of the existing A-Line are "significantly greater than the adverse effects in intensity and scale" in terms of land use, visual impact and effects on sites of significance to Māori, "even while taking account of the impact of the relocated line on views from the marae and proximity to the kōhanga reo".

(f) Considered it "must undertake a fair appraisal of the objectives and policies read as a whole".[47] The Court did not accept Policy 15 of the NZCPS requires consent to be declined or the proposal amended on the basis it has adverse effects on the ONFL. The NZCPS "does not have that kind of regulatory effect" and its terms do not provide that "any use or development in an ONFL would be inappropriate". What is inappropriate "requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the

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44 At [264].
45 At [265].
46 At [266].
47 At [267].

effects of the use or development may be on the things which are to be protected".

(g) Noted it is important that the existing environment of the ONFL includes the existing bridge and national grid infrastructure.[48]

(h) Considered it must also "have regard under s 104(1)(b)" to the relevant objectives and policies of the NPSET, RCEP and District Plan.[49] Those instruments "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved". Policy 6 of the NPSET guides the Court, consistently with the proposal, but "there is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved".

(i) Said finally:

> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

The appeal

[26] Under s 299 of the RMA, a party to a proceeding before the Environment Court "may appeal on a question of law to the High Court" against a decision, report or recommendation of the Environment Court. Under r 20.18 of the High Court Rules 2016, the appeal is "by way of rehearing".

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48 At [268].
49 At [269].

[27] TEPS appeals the Environment Court's decision. The Marae Trustees support the appeal as an interested party. Transpower, as the applicant for consent, supports the Environment Court's analysis. Ngāi Tūkairangi Trust supports the submissions of Transpower and does not make any additional submissions. The Councils, as the consent authorities, separately support the Court's decision.

[28] Counsel argued six or seven grounds of appeal. There was quite a lot of overlap in all parties' submissions from one ground to another. I group the grounds of appeal in terms of five issues and treat them in a different order. I treat submissions made by counsel in relation to the issue to which they are most relevant. The issues are:

(a) Was the Environment Court wrong to "bundle" the effects together?

(b) Was the Court wrong in its findings about adverse effects?

(c) Did the Court err in its approach to pt 2 of the RMA?

(d) Did the Court err in interpreting and applying the planning instruments?

(e) Was the Court wrong in its assessment of alternatives, including the status quo?

Issue 1: Was the Environment Court wrong to bundle the effects together?

The Environment Court's decision

[29] The Environment Court addressed the issue of "bundling" as the first preliminary issue. It stated:

> [96] It is generally accepted that where a proposal requires more than one consent and there is some overlap of the effects of the activity or activities for which consent is required, then the consideration of the consents should be bundled together so that the proposal is assessed in the round rather than split up, possibly artificially, into pieces.[50] Where, however, the effects to be

[50] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 579–580; and *King v Auckland City Council* [2000] NZRMA 145 (HC) at [47]–[50].

> considered in relation to each activity are quite distinct and there is no overlap, then a holistic approach may not be needed.[51]

[30] The Court recorded but rejected the appellant's argument that the proposal was in two parts that should be assessed separately using a structured approach.[52] It considered the term "effect" is defined broadly and inclusively in s 3 of the Resource Management Act 1991 (RMA) and is subject to the requirements of context.[53] The Court considered case law has generally interpreted and applied the statutory definition of "effect" in a realistic and holistic way.[54] It concluded:

> [110] These passages indicate that the correct approach to the assessment of effects involves not merely the consideration of each effect but also the relationships of each effect with the others, whether positive or adverse. This is consistent with the inclusion of cumulative effects in the definition in s 3: while many cases have considered the overall impact of cumulative adverse effects, there is nothing in s 3 which would prevent consideration of the cumulative impact of positive and adverse effects. Where effects are directly related and quantifiable in commensurable ways, then it may even be possible to sum the overall effect, but these passages also indicate that commensurability is not a pre-requisite to such consideration.
>
> [111] We also consider that such an approach is not limited to the level of individual effects but applies similarly to the whole activity. While one may conceive of an activity as separate elements with separate effects, that approach may not properly address the proposal as it is intended to occur or operate. Numerous provisions of the RMA, including the functions of territorial authorities and regional councils, indicate that the statutory purpose is to be pursued or given effect by methods which help to achieve the integrated management of the effects of the use, development or protection of resources. While there may be separate or ancillary activities which require separate consideration, the analysis should not be artificial. This approach is consistent with the identification of activities in terms of planning units which can assist in such integration.
>
> [112] In this case, we are satisfied that the proposal is to be assessed as a single one with its activities bundled together for the purposes of identifying the correct activity classification and considering the effects, positive and adverse, cumulatively. We note that counsel for the Appellant acknowledged that its two parts may only proceed together: without the new line, there would be no removal of the existing one. We agree and see that as determinative of this point.

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51 *Bayley v Manukau City Council,* above n 50, at 580; and *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513; [2000] NZRMA 529 (CA) at [21]–[22].

52 Environment Court, above n 1, at [100].

53 At [104].

54 At [106]–[108], citing *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC); *Marlborough District Council v New Zealand Rail Ltd*]1995] NZRMA 357 (EnvC); and *Auckland City Council v Minister for the Environment* [1999] NZRMA 49 (EnvC).

[31] In its overall conclusion, the Environment Court said that, even though it was "treating the proposal as a single one", the effects of the elements of the proposal "must be identified and analysed separately as they involve different things, but having done that, the judgment of whether the effects are appropriate … must be done in terms of all the effects".[55]

Submissions

[32] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Environment Court erred in rejecting a structured approach. He submits the Court should have considered the two distinct elements of the removal of the A-Line and construction of the new infrastructure separately. He submits doing so is particularly important given the "avoid" policies which require a proposal with adverse effects to be squarely confronted. He submits the Court netted off the adverse effects on the Marae with the benefits of removing Poles 116 and 117. The effect of that approach was to subsume the adverse effects into an overall net-effect analysis. This masked the effects on cultural values and circumvented the requirement to confront the terms of the planning documents.

[33] Mr Beatson, for Transpower, submits the Court properly accepted that relocation of the A-Line depended on consents being granted, which determined whether or not to consider the effects in a holistic way. He submits the Court was correct, given that the removal and placement are integrally related, and was consistent with the assessment of all expert witnesses and the authorities.

[34] Ms Hill, for the Councils, submits there is no material error of law. Separate assessment of each part of the proposal against the avoid policies would not necessarily prohibit a proposal with adverse effects. It would just require the effects to be squarely confronted. The Environment Court was clear that the effects of the separate parts of the proposal must be identified and analysed separately and it squarely confronted the effects of the proposal. The structured approach is not supported by the policy framework. The Court's "realistic and holistic" approach was

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55 Environment Court, above n 1, at [263].

appropriate and consistent with sound resource management practice, whereas the structured approach has no supporting authority.

Did the Court err in applying a bundling approach?

[35] The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law. The two elements of the proposal, removing old infrastructure and constructing new infrastructure, are integrally related. One would not occur independently of the other, as Mr Gardner-Hopkins acknowledged. The effects on cultural values were incorrectly determined, as I discuss in Issue 2. But they were not masked by the Court's approach. The Environment Court was correct to consider the effects of the proposal relating to Rangataua Bay in a realistic and holistic way. The effects on Matapihi and Maungatapu seem more independent of each other. Perhaps they could be separately considered. But that is not the argument advanced here. The problems with the Court's reasoning were not caused by its approach to bundling.

Issue 2: Was the Court wrong in its findings about adverse effects?

[36] The Court was required to consider whether the proposal had certain adverse effects. This issue concerns whether the Court's findings regarding adverse effects constituted an error of law.

Relevant provisions

[37] The Court was required to interpret and apply two policies of the Bay of Plenty Regional Coastal Environment Plan (RCEP).[56]

[38] First, Iwi Management Policy IW 1(d) requires proposals "which may affect the relationship of Māori and their culture, traditions and taonga" to "recognise and provide for" "[a]reas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements,

[56] Relevant extracts from the RCEP and other planning instruments are provided in full in the Annex to this judgment.

iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumātua".

[39] Schedule 6 identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

> Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi - known as "*Mai i ng*ā *Kurī a Whārei ki Wairakei*." Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land. Maintenance of kaimoana and coastal water quality is particularly important.
>
> …
>
> Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.
>
> Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

[40] IW 2 of the RCEP applies to "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS [Regional Policy Statement]". Advice Note 2 to the Policy states that "[t]he Areas of Significant Cultural Value identified in Schedule 6 are likely to strongly meet one or more of the criteria listed in Appendix F set 4 to the RPS".

[41] Second, Natural Heritage Policy NH 4 applies to "adverse effects" "on the values and attributes of" "[ONFL] (as identified in Schedule 3)". Te Awanui (Tauranga Harbour) is identified as ONFL 3, including the harbour around Maungatapu and Matapihi. Schedule 3 states "[t]he key attributes which drive the requirement for classification of ONFL, and require protection, relate to the high natural science values associated with the margins and habitats; the high transient

values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns".

[42] Schedule 3 of the RCEP provides assessment criteria for "Māori values" as "Natural features and landscapes that are clearly special or widely known and influenced by their connection to the Māori values inherent in the place". "Māori values" of ONFL 3 are rated as "medium to high" and evaluated as follows:

> Ancient pā, mahinga kai, wāhi tapu, kāinga, taunga ika.
>
> Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.
>
> Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

[43] Policy NH 4A provides:

> When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedule … 3 to this Plan …:
>
> (a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape …
>
> (b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;
>
> (c) Recognise the potential for cumulative effects that are more than minor;
>
> (d) Have regard to any restoration and enhancement of the affected attributes and values, and
>
> (e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

[44] The Tauranga City Plan, which has the legal status of a District Plan, should also be interpreted and applied. It identifies Te Ariki Pā/Maungatapu as a significant Māori area (No M 41) of Ngāti Hē.[57] Its values are recorded as:

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[57] Environment Court, above n 1, at [26].

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu / Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa / Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

[45] The iwi management plans, included in the Annex to this judgment, and invoked in other planning instruments, relevantly provide:

(a) Policy 10 of Te Awanui Tauranga Harbour Iwi Management Plan 2008 specifically records that "[i]wi object to the development of power pylons in Te Awanui".

(b) Policy 15.1 and 15.2 of the Tauranga Moana Iwi Management Plan is to "[o]ppose further placement of power pylons on the bed of Te Awanui" and "[p]ylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge".

(c) The Ngāi Te Rangi Resource Management Plan states:

> Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities – Maori and non Maori – shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.
>
> …
>
> Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

[46] Te Tāhuna o Rangataua (Rangataua Bay) is also listed in the New Zealand Heritage List/Rārangi Kōrero as a wāhi tapu historically associated with several iwi and hapū, including Ngāti Hē.[58]

Environment Court's decision on adverse effects

[47] In its lengthy discussion of cultural effects, the Environment Court outlined the consultation process, the iwi management plans, and the cultural impact assessments of the proposal.[59] It summarised the evidence of each witness from the Marae, Ngāi Te Rangi and Ngāi Tūkairangi.[60] In particular:

(a) The late Mr Taikato Taikato, chairperson of the Maungatapu Marae Trust and kaumātua, supported the removal of the A-Line from Te Ariki Park but did not support its replacement as an aerial line. This was because the cable would be directly in front of the marae and would "move the lines from our backs and put them back in front of our faces".[61] He had concerns about the noise from the lines. He believed Ngāti Hē could wait another year or two to get the right result. Mr Taikato agreed that he would want his mokopuna to enjoy the benefits that come with electricity, and that, should consent be refused, negotiations about replacing Poles 116 and 117 would have to start all over again.

(b) Dr Kihi Ngatai focused on the significance of Te Pā o Te Ariki, the pā site of Ngāti Hē. He told the Court his main purpose as a member of the Te Pā o Te Ariki Trust is to get the line shifted away from this significant site because it is wāhi tapu and should be left as it was when it became tapu; without powerlines.

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58 Heritage New Zealand *New Zealand Heritage List/Rārangi Kōrero – Report for a Wāhi Tapu Area: Te Tāhuna o Rangataua* at 5 and 22 (CBD 303.0663 and 303.0680).

59 Environment Court, above n 1, at [153]–[169].

60 At [170]–[193].

61 At [170]; and Statement of Evidence of Taikato Taikato on behalf of the Maungatapu Marae Trust, (25 March 2019) at 3 (CBD 202.0370).

(c) Ms Hinerongo Walker, a kuia and a Trustee of both the Maungatapu Marae and the kōhanga reo, and Ms Parengamihi Gardiner, a kuia who lives in the Kaumātua Flats on Te Ariki, gave evidence together. Ms Walker was concerned about the visual aesthetics and constant humming of the realignment and the impact on the marae and kōhanga reo. Ms Gardiner said they had been trying to have the lines removed, and confirmed she had submitted in favour of the proposal to remove the lines from Te Ariki Park. However, she said she did not want them removed if it meant an impact on the marae, the kōhanga reo or other people. When asked whether they supported the removal of Tower 118 from the middle of Te Awanui, they said that depended "on the removal of lines from here" and they looked it as a whole package.[62]

(d) Ms Matemoana McDonald, of Ngāti Hē and a councillor on the Bay of Plenty Regional Council, gave evidence on the changes to the cultural landscape of Ngāti Hē over her lifetime.[63] She said the Transpower proposal adds insult to injury in terms of what Ngāti Hē have lost in providing for the needs of the city, and said they do not want two new poles in close proximity to their sacred marae. She wanted to see alternative options considered and discussed to find a better solution to the proposal. She accepted that Transpower had put a lot of effort into trying to find a workable solution to the A-Line issue. She questioned why Pole 33C could not go to the other side of SH 29A, because although it could have effects on other parties on that side of the road, those houses would change hands over time, whereas Ngāti Hē would always be present at their marae. She confirmed that "Te Awanui and Te Tahuna has much significance as what the marae does".[64]

(e) Ms Ngawaiti Hera Ririnui, chairperson of Te Kōhanga Reo o Opopoti, said the potential effect of Pole 33C on tamariki that live on the marae

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62 NOE 260/3.
63 Statement of Evidence of Matemoana McDonald (8 April 2019) (CBD 202.0378).
64 NOE 276/6–9.

or attend the kōhanga reo was seen as negative, as there is no research that proves or disproves whether there is an impact on health from such powerlines.[65] She gave evidence of tamariki having full access to the area around the Marae and "tamariki out on the beach at Rangataua being taught by our kaimahi about what it means to be part of our community and be a member of Ngāti Hē".[66] She saw the pole as a "monstrous dark structure that's going to be hanging over our marae on a daily basis, lines that are going to be slung across our marae swinging in the wind for our tamariki to see".[67] She said generations have tried to fight the changes in the surrounding environment, but have never won. She agreed removal of the poles and wires from Te Ariki Park would be a benefit, but not if the poles were relocated to beside the kōhanga reo.

(f) Ms Yvonne Lesley Te Wakata Kingi, secretary of the Maungatapu Marae committee for 25 years, said she felt they were having to continue a battle to maintain the mana on their land. She talked about their use of the beach.[68] She stated they are being treated in the way Māori were when new people first began to settle there. She described wanting the marae to be a happy place, not only for Māori but for the visitors who come there.

(g) Mr Mita Michael Ririnui, a kaumātua, the chair of the Ngāti Hē Hapū Trust, and the Ngāti Hē representative on the Ngāi Te Rangi Settlement Trust and Te Rūnanga O Ngāi Te Rangi Iwi Trust, clarified that Ngāti Hē Hapū Trust supported the removal of the existing line from Te Ariki Park. However, the Trust had not given any support to the proposed structures including Pole 33C. He said the proposed

65 Environment Court, above n 1, at [179].
66 NOE 281/12–25.
67 NOE 281/27–30.
68 NOE 286/4–15.

structures are considered "a blight on the [Ngāti Hē] estate" and marae.[69]

(h) Mr Paul Joseph Stanley, Chief Executive of Te Runanga o Ngāi Te Rangi Iwi Trust, submitted "[i]t will be much better … if those lines were put across with the bridge or underneath the harbour".[70]

[48] In relation to cultural effects, the Court:

(a) said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui";[71]

(b) identified "the key cultural issues" to be "the damage to the mana of Maungatapu Marae and concern about the environment, particularly at the kōhanga reo there";[72]

(c) traversed the process of consultation in preparing the application;[73]

(d) summarised the submissions on the notified consent application, focussing on Ngāti Hē's position, including in this (implicitly critical) paragraph:[74]

> [205] The evidence for Ngāti Hē did not make any mention of the adverse effects on Ngāti Tūkairangi of not allowing the realignment. It did not address in detail the cultural matters affected by the existing line crossing the harbour, or the effects on the harbour and sea bed of the removal of Tower 118. The effects on cultural values relating to the moana generally did not appear to be front of mind. The evidence did not mention any cultural effects of the alternatives that Ngāti Hē preferred in terms of effects on the seabed of, for example, excavations for new piles or a trench to take the line below

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69 NOE 291/5–6.
70 NOE 265/19–20.
71 Environment Court, above n 1, at [194].
72 At [195].
73 At [196]–[197].
74 At [198]–[206].

> the harbour floor. The evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view.

(e) found that Transpower had carried out a full and detailed consultation, and that Ngāti Hē changed its mind, as it was entitled to do;[75]

(f) noted Ngāti Hē's frustration and anger about the original construction of the A-Line and accepted the cultural effects of that had adversely affected them for the last half-century;[76]

(g) found the removal of the A-Line and poles from Ngāti Hē's land at Te Ariki Park and of Tower 118 in Rangataua Bay would have positive effects;[77]

(h) "deeply regretted" the "adverse effects from their point of view" of Pole 33C, but found there was no opportunity to move the pole without adversely affecting other persons not before the Court;[78]

(i) found Ngāti Hē's preferred alternatives of a strengthened or new bridge or under-sea-bed crossing would reduce the effects on the marae and kōhanga reo but "may also, from our understanding of the evidence" have greater effects within the [Coastal Marine Area] and on the ONFL than those that will result from the aerial transmission line";[79]

(j) observed that Ngāi Tūkairangi consider the effects of the proposal on their land would be highly beneficial;[80]

(k) observed there is no certainty that a proposal Ngāti Hē can support will come forward or achieve their desired outcomes;[81]

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75 At [207]–[208].
76 At [209].
77 At [211].
78 At [212].
79 At [213].
80 At [214].
81 At [214]–[215].

(l) suggested changes to activities or to the environment may result in the cumulative effect being less than before and doubted the only proper starting point for assessing cumulative effects was prior to any development;[82]

(m) held that the question was whether Ngāti Hē is better or worse off in terms of the assessment of cumulative effects, deducting the removal of adverse effects from the creation of adverse effects, and noted Ngāti Hē "are clear in their view that they are worse off, not least because they see the proposed change as continuing to subject them to adverse effects";[83]

(n) considered no other group would be worse off by the proposal and some, "particularly Ngāi Tūkairangi and the residents along Maungatapu Road" would be better off and refusing consent would leave them worse off;[84]

(o) noted Transpower has said it will walk away from the realignment project if the appeal is granted and then strengthen or replace its infrastructure on Te Ariki Park, which does not require further consent;[85] and

(p) concluded:[86]

> [220] Ultimately, we have had to assess the realistic alternatives and the likely effects of those through the cultural lens as best we can, taking into consideration the interests of both hapū. **From the above analysis we do not find the proposed realignment to have cumulative adverse cultural effects on Ngāti Hē.** Existing adverse effects at Te Ariki Park will be removed and new adverse effects will occur near the marae and the kōhanga reo. We are conscious that the benefits to Ngāi Tūkairangi will be considerable. We conclude that the benefits of the realignment to Ngāti Hē, coupled with the benefits to Ngāi Tūkairangi, are greater than the adverse

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82 At [216].
83 At [217].
84 At [218].
85 At [219].
86 Emphasis added.

> effects of Pole 33C's placement near the marae and the kōhanga reo. For Ngāti Hē, those benefits will be felt as soon as the structures and line are removed from Te Ariki Park, and there is some urgency to that. Their removal will immediately facilitate change. The opportunity to change the configuration of the A-Line in relation to a bridge or sea-bed location may arise in future but Ngāti Hē cannot rely on that.

[49] In relation to the effects on the ONFL, the Environment Court compared and assessed the evidence of expert witnesses, in particular that of Ms Ryder for the Councils and Mr Brown for TEPS.[87] The Court was "unable to confirm Mr Brown's opinions in relation to what he considered [were] the significant effects on Māori values in ONFL 3 on the basis of the evidence provided by the cultural witnesses".[88]

[50] The Court further concluded:

> [246] We have no doubt about the importance of Rangataua Bay to the marae and to Ngāti Hē hapū. But we must draw the argument back to the assessment of the effects on ONFL 3 and its values, attributes and associations. The activities that will take place there are the removal of Tower 118 and the addition of a powerline above the SH 29A bridge. We heard no evidence about the effect of the removal of Tower 118 on Maori Values in the ONFL 3, except, as Ms Ryder pointed out, that there is a strong preference of iwi for no power pylons to be present in Te Awanui – and we cannot accept that taking this structure out of the centre of Rangataua Bay, where it stands alone, will not have benefits to Te Awanui in this area. Similarly, the removal of the powerlines to the SH 29A corridor consolidates the infrastructure into one place rather than having the line strung across the otherwise open Rangataua Bay, again surely a cultural benefit in relation to its current intrusion into the open airspace above the bay.
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> [247] The cultural witnesses expounded more on the effects on the marae of Pole 33C (and to a lesser extent pole 33D) with concern, as noted above, for the mana of the marae and the health of the tamariki who attend the kōhanga reo directly adjacent to it than they did on the effects of the activities that will take place within ONFL 3, the latter being the subject of this evaluation.
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> [248] During the removal of Tower 118 the works will be visible albeit short-lived and the realignment of the powerline to a new position above and parallel with the bridge will similarly be visible and could be considered by some viewers to be fleetingly adverse. The works may be visible from the marae and vicinity. We consider those effects both short term and long term to be *de minimis*. On the other hand, there will benefits to the ONFL from the removal of Tower 118 and the powerline.

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87 Summarised at [243], Table 3.
88 At [244].

Submissions on adverse effects

[51] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in light of the evidence before it, because the true and only reasonable conclusion is that there would be:

(i) at least some adverse effects in terms of ASCV 4 or otherwise on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment, contrary to Policy IW 2; and/or

(ii) significant, or at least some, adverse effects on Ngāti Hē's association with the cultural values of ONFL 3, contrary to Policy NH 4(b).

(b) It is for Ngāti Hē to identify the cultural impacts on them and they have done so. All the Ngāti Hē witnesses promoted the same overall outcome and gave a consistent message. They did not support the proposal because the benefits of the removal of the A-Line did not outweigh the adverse effects. Not one witness said the proposal should proceed if the cost was the poles being in front of the Marae. The evidence focussed on the visual dominance of the poles but kaumātua and kuia also raised wider issues of the connectedness of the Marae and the reserve with Rangataua Bay. The visual effects can clearly affect the aesthetic and experience of the ONFL. The moderate to high rating of Māori values in ONFL 3 answers the submission that Māori values are not a key component of the ONFL at the Bay.

(c) The Environment Court navigated around all that, finding the effects were de minimis. It was focussed on the effects of aerial lines crossing the harbour on the ONFL, not the effects of the large structures on either side that will impact on Ngāti Hē's cultural association with the harbour. If the Court had applied the right framework and focussed on

the poles as well as the lines, it could not have found the effects to be *de minimis*.

(d) It cannot be right that any adverse effect needs to be assessed against the Tauranga harbour as a whole, because that would require a proposal of a massive scale. In the context of this proposal, the appropriate scale must be Rangataua Bay. If the project proceeds and Poles 33C and 33D are constructed, the effects on Ngāti Hē and the Marae will continue for another two to three generations. They do not want an additional visual intrusion into their connectedness with Rangataua Bay from their marae or beach. If that is not available now, they are prepared to wait.

[52] Mr Beatson, for Transpower, submits:

(a) It could not be further from the truth to suggest the Court found there were no effects on cultural values at all or it imposed its own assessment of the cultural effects. The Court spent some 20 pages summarising the consultation and evidence on cultural effects. It weighed the evidence before concluding there was an overall positive cultural effect. The benefits of the realignment to Ngāti Hē and Ngāi Tūkairangi would be greater than the adverse effects of Pole 33C on the Marae and kōhanga reo. Its approach is consistent with *SKP Incorporated* and *Trans-Tasman Resources*.[89]

(b) The Court focussed its enquiry on the effects of ONFL. It noted the main adverse cultural effects related to visual effects on the Marae and kōhanga reo enjoyment of the ONFL, rather than on the values and attributes of ONFL 3. The description of the values and attributes is a guide to the key focus of the ONFL. Adverse effects on Māori values would not necessarily lead to the conclusion there is an adverse effect on the ONFL as a whole, in terms of the description. The Court found

[89] *SKP Incorporated v Auckland Council* [2018] NZEnvC 81; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.

the conclusion that the effects on the Māori values would be significant was not supported by the evidence of the cultural witnesses.[90]

(c) The Environment Court's findings were well supported by the landscape and cultural evidence. As the primary finder of fact it should be given latitude to do so. The appellant has not cleared the high bar of an "only true and reasonable conclusion". An assessment of the effects should take an overall approach, allowing the significant positive effects of the relocation to be taken into account. The relocation is more desirable than retaining the status quo.

[53] Ms Hill, for the Councils, submits:

(a) The weight given to particular considerations by the Environment Court is not able to be revisited as a question of law. It should be given some latitude in reaching findings of fact within its area of expertise, with which the High Court should not readily intervene.

(b) The Environment Court thoroughly set out and carefully evaluated the cultural evidence. It observed the evidence given by the cultural witnesses focussed on the visual effects of the pole in front of their marae rather than the effects on the cultural values of ONFL 3. The values and attributes of the ONFL include the national grid infrastructure so that is why the effect of the proposal is *de minimis*.

(c) Policy IW 2 is not a directive policy. The Court clearly explained its approach to the cumulative effects on Ngāti Hē arising from historical matters. The effects on Ngāti Hē are only part of the wider cultural equation. Cultural values are often intangible and it is difficult to avoid something that cannot be seen.

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90 Environment Court, above n 1, at [228].

Did the Court err in its findings about adverse effects?

[54] It is clear from the evidence before the Court, as summarised above, that Ngāti Hē considers the re-alignment proposal would have an overall adverse effect compared with the status quo. In particular, they are concerned about the implications of the location of Pole 33C on their use and enjoyment of their marae and kōhanga reo, and the effects on the ONFL. The Environment Court summarised the submissions this way:

> [198] Submissions received on the notified consent application in 2018 indicated opposition to the proposal, specifically around Pole 33C, and the effects on the ONFL. Neither had been raised previously. The effects of Pole 33C were expressed in terms of cultural values, effects of noise and electro-magnetic radiation, visual effects of the pole and line, effects on kōhanga reo children, effects on the mana of the marae, ongoing cumulative effects on the Hapū of developments being imposed on their land over the last 50 or so years, which they claimed was illegal (that matter is not being pursued through this hearing), and the need for greater attention to alternatives they preferred which were bridge and sea-bed options, including a new bridge (and cycleway).

[55] That view is understandable given the history and cultural values of Ngāti Hē that are recognised in ASCV 4 and ONFL 3 of the RCEP and substantiated by the evidence of kuia and kaumātua of Ngāti Hē. It is consistent with the identification in the Tauranga City Plan of Te Ariki Pā and Maungatapu as a significant area for Ngāti Hē with special values and significance in terms of mauri, wāhi tapu, korero tuturu and whakaaronui o te Wa. It is consistent with the significance of Tauranga Moana to Ngāi Te Rangi as a physical and spiritual resource, recognised by the Crown in the Deed of Settlement. It is consistent with the objections in the Iwi Management Plans to power pylons and the emphasis of Ngāi Te Rangi's Resource Management Plan on the importance of marae. It is consistent with the Marae Sightlines Report, which was in evidence before the Environment Court and referred to by several witnesses. That report was prepared for SmartGrowth and the Combined Tāngata Whenua Forum in 2003 to review the visual setting, values and landscape context of 36 marae in the Western Bay of Plenty.[91] Its conclusions stated:[92]

> Protecting visual access and linkages to the ancestral landscape is critical to the personal and cultural wellbeing of the tāngata whenua of the rohe.

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91 Kaahuia Policy Resource Planning & Management *Marae Sightlines Report* (December 2003) (CBD 301.0143).

92 At 34–35 (CBD 301.0163–301.0164).

> Discrete taonga identifiable as landscape markers or pou whenua cue the oral traditions, poetry and waiata, traces events leaders and traditions, catalyses and facilitates the education of generation to generation and serves as personal mentor.
>
> …
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> The sense of belonging and turangawaewae is dependent on the quality of the visual of the surrounding landscape. The challenge then is to promulgate a landscape management principle dedicated to tāngata whenua interest to protect the mnemonic – iconic values associated with their rohe and turangawaewae. Particular regard for their relationship with the landscape as a component of landscape quality and diversity is required.

[56] In its decision, the Court explicitly noted that Ngāti Hē "were opposed to the aerial transmission line and wanted a bridge or sea bed harbour crossing".[93] It recorded that "[t]hey are clear in their view that they [will be] worse off, not least because they see the proposed change as continuing to subject them to adverse effects".[94] The Court recorded that "the evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view".[95] In its conclusion, the Court said:

> [264] The proposed relocation of the A-Line to an alignment which follows SH 29A and is located above the Maungatapu Bridge does not result in wholly positive effects. While it enables the removal of the existing line and ensures security of electricity supply, its location is not ideal. In particular, placing the line above the Maungatapu Bridge, with associated tall poles, creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A.

[57] The depth of Ngāti Hē's opposition to the proposal is reflected in their preference for the status quo over the proposal. In its Deed of Settlement with Ngāi Te Rangi, the Crown acknowledged the infrastructure networks on the Maungatapu peninsula "have had enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi" while making a "significant contribution . . . to the wealth and infrastructure of Tauranga".[96] The Court said:

> [209] The cultural evidence described the frustration and anger held by the hapū over many years as a result of the original construction of the A-Line across Te Ariki Pā and the earthworks for roading and bridge construction that affected their marae. We acknowledge the information and opinions provided about the history of development activities in the Ngāti Hē rohe and accept

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93 Environment Court, above n 1, at [200].
94 At [217].
95 At [205].
96 Deed of Settlement, above n 2, cls 3.15.5 and 3.16.1.

that these cultural effects have adversely affected the hapū for the last half century.

[58] Yet Ngāti Hē preferred that status quo to the proposal.

[59] The Environment Court's conclusion in relation to the cultural effects of the proposal, relevant to IW 2, or the effects on the values of the ONFL relevant to NH 4, did not reflect the evidence before it:

(a) Having set out in 67 paragraphs the extent and depth of Ngāti Hē's firm opposition to the proposal, in one paragraph the Court effectively found that the adverse cultural effects would be outweighed by the beneficial effects.[97] That involved the Court saying explicitly that it did not find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē,[98] even though it had found Ngāti Hē clearly considers it would.[99]

(b) In relation to the ONFL, the Court said it had no doubt about the importance of Rangataua Bay to the marae and Ngāti Hē.[100] That is clearly demonstrated by the evidence before it. But the Court concluded the long-term visual effects of the works from the marae and vicinity to be "de minimis".[101]

[60] The Supreme Court's judgment in *Bryson v Three Foot Six Ltd* is the most authoritative current exploration of the parameters of questions of law.[102] In summary:

(a) Misinterpretation of a statutory provision obviously constitutes an error of law.[103]

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97 Environment Court, above n 1, at [220].
98 At [220].
99 At [217].
100 At [246].
101 At [248].
102 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 72. Applied in an RMA context in *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].
103 At [24].

(b) Applying law that the decision-maker has correctly understood to the facts of an individual case is not a question of law. "Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable".[104]

(c) But "[a]n ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law, because proper application of the law requires a different answer".[105] The three rare circumstances in which that "very high hurdle"[106] would be cleared are where "there is no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination" or "the true and only reasonable conclusion contradicts the determination".[107]

[61] I consider the Court's conclusions about the evidence were insupportable in terms of *Bryson v Three Foot Six Ltd*. The Court accurately summarised Ngāti Hē's clear opposition to the proposal on the basis of its significant adverse effects on an area of cultural significance and on the Māori values on the ONFL. But it refused to find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē and it found that the long-term visual effects from the marae and vicinity would be "de minimis".

[62] The evidence of Ngāti Hē, as summarised above, is contradictory of those findings. The evidence is that, in Ngāti Hē's view, Pole 33C will have a significant and adverse impact on their use and enjoyment of the Marae and on their cultural relationship with Te Awanui, even taking into account the removal of the existing

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104 At [25].

105 At [26]. The sentence quoted in *Bryson* contained a semi-colon rather than the word "because", which was inserted in the application of the principle in the subsequent Supreme Court judgment in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52].

106 *Bryson v Three Foot Six Ltd*, above n 102, at [27].

107 *Edwards v Bairstow* [1956] AC 14 (HL) at 36. These can also be seen as circumstances of unreasonableness: *Hu v Immigration Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28] and footnote 27.

adverse effects. For the purposes of IW 2, this constitutes a significant adverse effect on Rangataua Bay, an "area of spiritual, historical or cultural significance to tāngata whenua" identified in ASCV 4. For the purposes of NH 4, taking into account the considerations in NH 4A, it constitutes a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3. I consider those are the true and only reasonable conclusions. Even though cultural effects may be intangible, they are no less real for those concerned, as the evidence demonstrates.

[63] The Court's approach is not saved by a distinction between the "values and attributes" of the ONFL and the ONFL itself. The Māori values of ONFL 3 are rated as medium to high and clearly encompass connections to ancestral and cultural heritage sites. The evidence is that Pole 33C would interfere with those connections with Rangataua Bay, including on the beach.

[64] As Mr Gardner-Hopkins submits, an effect of a proposal at Rangataua Bay does not have to be assessed for its impact on the whole Tauranga Harbour, just Rangataua Bay. And neither is the Court's approach saved by it being an overall assessment of cultural effects, including the effects on Ngāi Tukairangi. The Court clearly rested its conclusions on its findings that the effects on Ngāti Hē alone would be, on balance, positive for Ngāti Hē. It relied on evidence from an expert landscape architect for the councils, Ms Ryder, to that effect.[108] But that was not Ngāti Hē's view. As the Court recorded Mr Gardner-Hopkins submitted:[109]

> While the evidence for the marae trustees was not articulated in terms of cultural values of the ONFL it provides significant support for the importance of Rangataua Bay to the Marae and Ngāti Hē Hapū (and other mana whenua). It provides real world support for and elaboration on the "cultural values" as expressed in the RCEP for ONFL 3 but with greater specificity as to location and content. The evidence was genuine and heartfelt, and should not need a "cultural expert" to have to put it into "planning speak".

[65] The effect of the Court's decision was to substitute its view of the cultural effects on Ngāti Hē for Ngāti Hē's own view. The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant

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108 Environment Court, above n 1, at [228]–[229].
109 At [245].

and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.

[66] Deciding otherwise is inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA. It is inconsistent with the approach in *SKP Incorporated v Auckland Council*, approved by the High Court in 2018 that:[110]

> … persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.

[67] Deciding otherwise is also inconsistent with the requirement of Policy IW 5 of the RCEP, and similar statements in Policies IW 2B(b) and IW 3B(e) of the RPS. Contrary to the Court's finding, the RCEP is specific enough about the cultural values and attributes of Rangataua Bay and Te Awanui. Policy IW 5 states:[111]

> Decision makers shall recognise that only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

[68] Mr Taikato and Mr Ririnui are kaumātua. Ms Walker and Ms Gardiner are kuia. The evidence of Ngāti Hē is clear.

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110 *SKP Incorporated v Auckland Council*, above n 89, at [157]. On appeal, Gault J considered the general statement of position in support of the proposal by the party taken to represent mana whenua "resolved any cultural effects issue". (He accepted that finer grained evidence would be required in an application for re-hearing where two entities were claiming mana whenua with competing evidence on cultural effects): *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879 at [57].

111 Bay of Plenty Regional Council *Proposed Bay of Plenty Regional Coastal Environment Plan (RCEP)* at 38 (CBD 302.0302).

[69] I do not readily reach a different view of the facts to that of the Environment Court. But I consider proper application of the law requires a different answer from that reached by the Court regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of the ONFL. Accordingly, the Court's findings about those matters constitute an error of law. Whether that matters to the outcome of the appeal depends on how material the error was, which I consider in the context of the remaining issues.

Issue 3: Did the Court err in its approach to pt 2 of the RMA?

[70] This ground of appeal is whether the Court erred in not applying pt 2 of the RMA. It is integrally related to the submissions of counsel about whether the Court should have, and did, apply an "overall judgment" approach.

Part 2 of the RMA and the former overall judgment approach

[71] Part 2 of the RMA provides the overall sustainable management purpose and principles of the Act. Section 5(1) in pt 2 states that the purpose of the Act "is to promote the sustainable management of natural and physical resources". Section 5(2) explains that "sustainable management" means "managing the use, development, and protection of natural and physical resources in a way … which enables people and communities to provide for their "social, economic, and cultural well-being" while:

> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[72] The Act then provides for a cascading hierarchy of legal instruments in "a three-tiered management system" which give effect to pt 2.[112] A document in a tier must give effect to, or not be inconsistent with, those in the tiers above. The highest tier is national policy statements, which set out objectives and identify policies to

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[112] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*EDS v King Salmon*] at [10] and [30].

achieve them. The next tier are regional policy instruments, which identify objectives, policies and methods of achieving them including rules, that are increasingly detailed as to content and location.

[73] The tiers of planning instruments are the legal instruments which "flesh out" how the purpose and principles in pt 2 apply in a particular case in increasing detail and specificity.[113] The Supreme Court explained in *EDS v King Salmon* the importance of attending to the wording of the planning instruments, as with any law:

> [129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, 'avoid' is a stronger direction than 'take account of'. That said however, we accept that there may be instances where particular policies in the NZCPS 'pull in different directions'. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.
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> [130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.
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> [131] A danger of the 'overall judgment' approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them…

[74] So, although pt 2 is relevant to decision-making, because it sets out the RMA's overall purpose and principles, the basis for decision-making is the hierarchy of planning documents.[114] The Supreme Court noted in *EDS v King Salmon* that pt 2 of the RMA may be relevant if a planning document, there the NZCPS, does not "cover the field" or to assist in a purposive interpretation if there is uncertainty as to the meaning of particular policies in the NZCPS.[115]

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113 At [151].
114 At [151].
115 At [88].

[75] There has been some debate as to the implications for this approach of following the subsequent Court of Appeal judgment in *RJ Davidson Family Trust v Marlborough District Council*.[116] There, the Court of Appeal accepted that, in considering a resource consent application compared with a plan change proposal, a decision-maker must have regard to the provisions of pt 2 when appropriate.[117] The Court said that applications for resource consent "cannot be assumed" to "reflect the outcomes envisaged by pt 2" and "the planning documents may not furnish a clear answer to whether the consent should be granted or declined".[118] It did not consider that the Supreme Court's rejection of the "overall judgment" approach prohibited consideration of pt 2 in the context of resource consent applications.[119]

[76] There are obiter comments by the Court of Appeal in *RJ Davidson Family Trust* that appear to suggest the Supreme Court's proscription of the "overall judgment" approach in *EDS v King Salmon* might not apply outside a context that engages the NZCPS.[120] However, this case does engage the NZCPS. It is clear that, where the NZCPS is engaged, any consent application will necessarily be assessed applying the provisions of the NZCPS and other relevant plans, and also pt 2 if it is otherwise unclear whether the consent should be granted or not.[121] Part 2 cannot be used "for the purpose of subverting a clearly relevant restriction in the NZCPS".[122] Where there is "doubt" as to the outcome of the consent application on the basis of the NZCPS, recourse to pt 2 is necessary.[123] Recourse to pt 2 may or may not assist, depending on the provisions of the relevant plan.[124]

[77] In any case, I read the Court of Appeal's comments as being focussed on permitting reference to pt 2 of the RMA. I do not read the Court of Appeal to be endorsing the previous approach of courts simply listing relevant considerations, including provisions of planning documents, and stating a conclusion under the rubric

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116 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
117 At [47].
118 At [51].
119 At [66].
120 At [67]–[69] and [71].
121 At [71] and [73].
122 At [71].
123 At [75].
124 At [75].

of an "overall judgment" in relation to consent applications that do not engage the NZCPS. The Supreme Court was clear about the obvious defects of that approach.[125] It is inconsistent with the text and purpose of the RMA, inconsistent with the need to give meaning to the text of the plans as the legal instruments made under the RMA, and inconsistent with the rule of law. The Court of Appeal's statement, that in all cases not involving the NZCPS "the relevant plan provisions should be considered and brought to bear on the application" makes it clear it does not advocate for that.[126] Rather, the Court considered there must be "a fair appraisal of the objectives and policies [of a plan] read as a whole".[127] While the Court of Appeal expanded on the use of pt 2 of the RMA, I do not consider its judgment contradicted the reasoning of the Supreme Court in warning about the defects of the overall judgment approach in relation to particular consent applications.

[78] This was illustrated in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*.[128] That case involved a challenge to the formulation of natural heritage policies for the Regional Coastal Environment Plan (RCEP) on the basis of inconsistency with the NZCPS. Wylie J held:

(a) The Environment Court was not entitled to focus on the unchallenged provisions of the planning document at issue, or the one immediately above it and ignore or gloss over higher order planning documents.[129]

(b) The Court erred in resolving tensions in RCEP policies primarily by reference to the RCEP's objectives, with only limited reference to the RPS and NZCPS.[130] The Court "failed to make 'a thoroughgoing attempt to find a way to reconcile' the provisions it considered to be in tension".[131]

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125 *EDS v King Salmon*, above n 112, at [131]–[140].
126 *RJ Davidson Family Trust v Marlborough District Council,* above n 116, at [73].
127 At [73], citing *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].
128 *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1.
129 At [84].
130 At [89].
131 At [98], citing *EDS v King Salmon*, above n 112, at [131].

(c) The "proportionate" approach adopted by the Environment Court was an overall judgment approach, "albeit by a different name", of the sort that had been "roundly rejected" by the majority of the Supreme Court in *EDS v King Salmon*.[132] It was not available to the Court to suggest that the benefits and costs of regionally significant infrastructure that could have adverse effects on areas of Indigenous Biological Diversity, which are areas with outstanding natural character in the coastal environment, should be assessed on a case-by-case basis having regard to all relevant factors.[133]

(d) Accordingly, the Environment Court erred in:

(i) approving policies and a rule that did not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a) of the NZCPS;[134]

(ii) by failing to consider the directive nature of Policies CB 2B and CE 6B of the RPS;[135] and

(iii) by failing to recognise that the objectives in the RCEP recognise that "provision needs to be made for regionally significant infrastructure, but not in all locations in the coastal marine area".[136]

[79] The Supreme Court's decision in *EDS v King Salmon*, and the Court of Appeal's decision in *RJ Davidson*, requires decision-makers to focus on the text and purpose of the legal instruments made under the RMA. A decision-maker considering a plan change application must identify the relevant policies and pay careful attention to the way they are expressed.[137] As with any legal instrument, the text of the

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132 At [103]
133 At [106].
134 At [123].
135 At [129].
136 At [135].
137 At [128]–[129].

instrument may dictate the result. Where policies pull in different directions, their interpretation should be subjected to "close attention" to their expression. Where there is doubt after that, recourse to pt 2 is required.[138] The same approach, of carefully interpreting the meaning and text of the relevant policies, is required in applying them to consent applications, for the same reasons. That is consistent with the standard purposive interpretation of enactments, as summarised by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*:[139]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

The Environment Court's treatment of pt 2

[80] Here, the Environment Court held, with reference to *RJ Davidson*, that it is "necessary to have regard to Part 2, when it is appropriate to do so", but reference to pt 2 is "unlikely to add anything" where it is clear a plan has been competently prepared having regard to pt 2.[140] "[A]bsent such assurance, or if in doubt, it will be appropriate and necessary to do so".[141] The Court considered submissions about whether reference to pt 2 was required here, in particular regarding the relationship between the NPSET and NZCPS, or whether those instruments were clear and had been reconciled in the formulation of the RCEP.[142] The Court considered evidence of expert planning witnesses about whether to refer to pt 2,[143] which is irrelevant and an error given that the necessity or otherwise of reference to pt 2 is an issue of law. The Court said:

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138 At [75].

139 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

140 Environment Court, above n 1, at [59].

141 At [59].

142 At [60]–[67], citing *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 128, and related Environment Court judgments.

143 At [66].

> [68] We agree that the RCEP is comprehensive, has been tested through hearing and appeal processes and provides a clear policy framework and consenting pathway for these applications. Accordingly, our evaluation of the statutory provisions focusses on the relevant policies in the RCEP. We also address the higher order policy documents and the District Plan.

[81] The Court acknowledged the need to give effect to national policy statements according to their particular terms, rather than on the basis of a broad overall judgment.[144]

[82] In the final two paragraphs of its concluding reasoning, after rejecting the argument that the NZCPS required consent to be declined, the Court said:

> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
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> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on pt 2 and the overall judgment approach

[83] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Court erred by failing to assess the proposal against pt 2, including ss 6(3), 7(a) and 8, directly. The nature of the issues, the meaning of the policies and the relationship between the NZCPS and NPSET made it "appropriate and necessary" for it to do so. He submits the Court erred in applying an overall judgment of the proposal against s 5 selectively, without analysis, and without consideration of the balance of pt 2. *RJ Davidson* does

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144 At [92].

not mean that reference to pt 2 only occurs if there is a problem. Rather, pt 2 and superior planning instruments must be taken into account in a difficult case, as it was here. He submits that pt 2 should be used in a purposive interpretation of the terms in the RCEP.

[84] Mr Beatson, for Transpower, submits:

(a) *EDS v King Salmon* rejected the previous "overall broad judgment approach". *RJ Davidson* confirms recourse to pt 2 is only necessary where there is a question as to whether a plan has been competently prepared having regard to pt 2. The Court was correct that it is up to a decision-maker to give competing policies such weight as it thinks necessary in the context.

(b) The Court found there is no need for an overall evaluation under pt 2 at the consenting stage where plans have been prepared having regard to pt 2. Here, the Court found the RCEP is comprehensive and provides a clear policy and consenting pathway for the project, so it focussed on the RCEP policies. The relevance to a proposal of higher order documents, which have been reconciled and prepared in accordance with pt 2, does not justify concluding it is unclear as to whether consent should have been granted. No defect within the RCEP has been identified that makes recourse to pt 2 necessary. The Court's concluding paragraphs were not attempting to undertake a pt 2 analysis.

(c) Regardless of its decision that recourse to pt 2 was not necessary, the Court carefully set out the cultural evidence provided by witnesses, the consultation undertaken by Transpower, the potential cumulative cultural effects and how the cultural effects on both hapū would be impacted by the proposal. That is the same analysis that would be undertaken under ss 6(e), 7(a) and 8. Addressing those sections directly would have added nothing. Sections 7(b), 7(c) and 7(f) of pt 2 of the RMA would also be relevant. The conclusions reached would inevitably have been the same.

[85] Ms Hill, for the Councils, submits the Environment Court exercised a discretionary judgment not to consider the proposal against pt 2.[145] As the Court of Appeal held in *RJ Davidson*, assessment against pt 2 is only necessary where a plan has not been competently prepared in accordance with pt 2. The Court correctly observed that, in applying the policies, no specific outcomes are particularised and no outcome that would wholly avoid adverse effects was possible.[146] Its consideration of s 5 did not purport to be an assessment against pt 2.

Did the Court err in its approach to pt 2?

[86] I outlined above the proper approach to pt 2 of the RMA and the legal defects of the overall judgment approach. Consistent with *EDS v King Salmon* and *RJ Davidson Family Trust,* a Court will refer to pt 2 if careful purposive interpretation and application of the relevant policies requires it. That is close to, but not quite the same as, Mr Gardner-Hopkins' submission that recourse to pt 2 is required "in a difficult case". To the extent that Mr Beatson's and Ms Hill's submissions attempt to confine reference to pt 2 only to situations where a plan has been assessed as "competently prepared", I do not accept them.

[87] Mr Beatson is correct that the Court here considered that the RCEP is comprehensive and provides a clear policy framework and consenting pathway for the proposal.[147] The Court also correctly acknowledged the need to give effect to the National Policy Statement according to their particular terms "rather than on the basis of a broad overall judgment".[148] But the Court did not provide the careful analysis required of how the relevant planning instruments should be interpreted and applied to the proposal. It stated that the planning instruments contain "relevant objectives and policies to which we must have regard".[149] That generic characterisation recalls the overall judgment approach that the Supreme Court ruled out in *EDS v King Salmon*. The planning instruments are more than "relevant" and the Court must do more than "have regard" to them.

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145 Environment Court, above n 1, at [59]–[68].
146 At [269].
147 At [68].
148 At [92].
149 At [269].

[88] In the last two paragraphs of its reasoning, the Court characterised the regional and district plans as generally treating as desirable both the protection of ONFL and provision of network infrastructure. It characterised Policy 6 of the NPSET as guiding it to reduce existing adverse effects of transmission. But the Court said the NPSET and NZCPS do not provide guidance as to how potential conflict between them should be resolved. So it fell back on reaching "a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA".[150] In only two further sentences, the Court made a "judgment" that the proposal was "more appropriate overall" than the status quo.[151] This is effectively, and almost explicitly, the application of an overall judgment approach. As such, it was an error of law.

[89] Instead, what the Court was required to do was to carefully interpret the meaning of the planning instruments it had identified, the RCEP in particular, and apply them to the proposal. If the text of the RCEP was not sufficient to do that, as the Court considered they were not, it was required to have recourse to the higher-level instruments such as the NZCPS and NPSET, and to pt 2 of the Act. The Court did consider the NZCPS and NPSET and found them insufficient. Yet all parties agreed the Court did not have recourse to pt 2.

[90] The Court's approach to pt 2, and its use of an overall judgment approach, was a legal error. Whether that makes sufficient difference to the outcome to sustain the appeal depends on the outcome of that exercise, which I examine next.

Issue 4: Did the Court err in interpreting and applying the planning instruments?

[91] The submissions on this ground of appeal centred on whether one national policy statement, the NZCPS, is inconsistent or takes priority over another, the NPSET. Lying behind that were submissions as to whether the NZCPS or the RCEP contains directive provisions determining the result of the application.

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150 At [270].
151 At [270].

The RMA and bottom lines

[92] The Supreme Court in *EDS v King Salmon* clarified that a policy of preventing adverse effects of development on particular areas is consistent with the sustainable management purpose of the RMA.[152] It held that "avoid", in s 5 and the NZCPS, is a strong word that has its ordinary meaning of "not allowing" or "preventing the occurrence of".[153] The use in s 5 of "remedying and mitigating" indicates that developments with adverse effects could be permitted if they were mitigated or remedied, assuming they were not avoided.[154]

[93] Specific decisions depend on the application of the hierarchy of planning instruments. Accordingly, the RMA envisages that planning documents may (or may not) contain "environmental bottom lines" that may determine the outcome of an application.[155] This illustrates why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them and reaching some "overall judgment".[156]

[94] The RMA also envisages that there may be cultural bottom lines. As Whata J stated recently in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, "… there is comprehensive provision within the RMA for Māori and iwi interests, both procedurally and substantively".[157] The cascading hierarchy of the RMA, and the legal instruments under it, accord an important place to the cultural values of Māori. That is reflected in pt 2 of the Act:

(a) The core purpose of the Act, stated in s 5, is to promote sustainable management by managing the "use, development and protection of resources in a way which enables people and communities" to provide for their "social, economic, and cultural well-being" at the same time as sustaining the potential of resources to meet the reasonably foreseeable needs of future generations.

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152 *EDS v King Salmon*, above n 112, at [24](d).
153 At [24](b), [96] and [126].
154 At [24](b).
155 At [47].
156 At [39]–[41].
157 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [29].

(b) The requirements on all persons exercising functions and powers under the Act in relation to "managing the use, development, and protection of natural and physical resources":

(i) to "recognise and provide for" "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as one matter of national importance in s 6(e);

(ii) to "have particular regard to" kaitiakitanga in s 7(a); and

(iii) to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)" in s 8.

Māori values in the RMA recognised in case law

[95] The implications of those pt 2 provisions have been recognised in case law. In 2000, in his last sitting in the Judicial Committee of the Privy Council in *McGuire v Hastings District Council*, Lord Cooke described pt 2 of the RMA as "strong directions, to be borne in mind at every stage of the planning process".[158] They mean "that special regard to Māori interests and values is required in such policy decisions as determining the routes of roads".[159] In that case, which involved a challenge to the designation of a road through Māori land, the Privy Council held "if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route".[160] This principle would extend to not constructing the new route at all in that case if "other access was reasonably available".[161] All authorities making decisions are therefore "bound by certain requirements, and these include particular sensitivity to Maori issues".[162] The Judicial Committee was satisfied that Māori land rights are adequately protected by the RMA.[163]

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158 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].
159 At [21].
160 At [21].
161 At [21].
162 At [21].
163 At [29].

[96] Similarly, in 2014 the Supreme Court in *EDS v King Salmon* affirmed that "the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind".[164] In its reasoning rejecting the "overall judgment approach", the Supreme Court held that s 58 of the RMA was inconsistent with the NZCPS being no more than a statement of relevant considerations.[165] Section 58 contemplates the possibility, depending on the meaning of the planning instruments, that there might be absolute protection from the adverse effects of development — a potential environmental bottom line.

[97] The Supreme Court's emphasis on s 58 is also relevant to this case. Section 58(1)(b) empowers a NZCPS to state objectives and policies about "the protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga mataitati, and taonga raranga" and, in s 58(1)(gb), "the protection of protected customary rights". This indicates that cultural bottom lines, as well as environmental bottom lines, can be provided for under the NZCPS. Whether there are particular cultural bottom lines depends on the text and interpretation of the relevant planning instruments.

[98] In 2020, the Court of Appeal in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (currently under appeal to the Supreme Court), the Court of Appeal considered an appeal of decisions on consent applications under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[166] The Court held the decision-maker erred by "failing to give separate and explicit consideration" to environmental bottom lines; failing to address the effects of the proposals on the cultural and spiritual elements of kaitiakitanga; and in failing to identify relevant environmental bottom lines under the NZCPS and consider whether the proposal would be consistent with them.[167]

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164 *EDS v King Salmon*, above n 112, at [88].
165 At [117].
166 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 89.
167 At [12](a), [12](c), and [12](d) and [201].

[99] The Court held the interests of Māori in relation to all taonga, referred to in the Treaty of Waitangi and regulated by tikanga, were included in a statutory requirement to take into account the effects of activities on "existing interests".[168] It held it was necessary for the decision-maker to "squarely engage with the full range of customary rights, interests and activities identified by Māori as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests".[169] The Court stated:

> [174] In this case, the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right – as ancestors, gods, whānua – that iwi have an obligation to care for and protect.

[100] Also in 2020, in *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd*, after comprehensively traversing the ways in which the RMA recognises Māori cultural values, Whata J observed that:[170]

> [73] … the obligation 'to recognise and provide for' the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision. …
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> …
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> [102] … where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e) , 6(g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. …

The NZCPS and NPSET

[101] The NZCPS and NPSET are national policy statements which bear on the interpretation of lower order planning instruments. The NZCPS of 1994 was the first national policy statement formulated. It was substantially revised in 2010, under s 58 of the RMA. Under s 56, the purpose of a NZCPS is "to state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand". Under ss 62(3), 67(3) and 75(3), regional policy statements, regional plans and district plans must "give effect" to the NZCPS. Its 29 policies support seven

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168 At [163] and [177].
169 At [170].
170 *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd,* above n 157.

stated objectives. The relevant Objectives and Policies are set out in the Annex to this judgment. As explored further below they involve three sets of relevant values: protection of natural features and landscape; culture; and social, economic, and cultural values.

[102] Policy 15 of the NZCPS was a particular focus in *EDS v King Salmon* and is in this case too. The Supreme Court held that:

(a) Policy 15 of the NZCPS, in relation to natural features and landscapes, states a policy of directing local authorities to avoid adverse effects of activities on natural character in areas of outstanding natural landscapes in the coastal environment.[171]

(b) The overall purpose of the direction is to "protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development".[172] It provides a graduated scheme of protection that requires avoidance of adverse effects in outstanding areas but allows for avoidance, mitigation or remedying in others.[173]

(c) The broad meaning of "effect" in s 3 must be assessed against the opening words of the policy.[174] Consistent with Objectives 2 and 6, "avoid" in Policy 15 bears its ordinary meaning as stated above.[175] Similarly, "inappropriate" use and development should be assessed against the characteristics of the environment that the Policy seeks to preserve.[176]

(d) Policies 15(a) and 15(b) provide "something in the nature of a bottom line".[177] It considered "there is no justification for reading down or otherwise undermining the clear terms" of the policy.[178]

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171 *EDS v King Salmon*, above n 112, at [58] and [61].
172 At [62].
173 At [90].
174 At [145].
175 At [96].
176 At [100]–[102] and [126].
177 At [132].
178 At [146].

[103] The NPSET was the second national policy statement formulated. Under s 45 of the RMA its purpose is to "state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act". Sections 62(3), 67(3) and 75(3) also require regional policy statements, regional plans and district plans to effect to it. The NPSET sets out the objectives and policies for managing the electricity transmission network under the RMA. The relevant Objectives and Policies are also set out in full in the Annex to this judgment. They set out relevant considerations for, and impose requirements on, decision-makers.

The relationship between the NZCPS and NPSET

[104] In an interim judgment in *Transpower New Zealand Ltd v Auckland Council*, Wylie J considered the respective relationships of the NZCPS and NPSET to the purposes of the RMA.[179] He noted that documents lower in the planning hierarchy are required to give effect to both of them and he considered *EDS v King Salmon*.[180] He noted that a national policy statement "can provide that its policies are simply matters decision-makers must consider in the appropriate context, and give such weight as they consider necessary" and accepted that the NPSET does so provide.[181] Before undertaking a detailed analysis of the text of the NPSET policies, regional policy statement and district plan provisions relevant there, he said:

> [83] I also agree with Ms Caldwell and Mr Allan that the New Zealand Coastal Policy Statement at issue in *King Salmon*, and the NPSET, derive from different sections of the Act, which use different terms. Section 56 makes it clear that the purpose of the New Zealand Coastal Policy Statement is to state policies in order to achieve the purpose of the Act. In contrast, the NPSET was promulgated under s 45(1). Its purpose is to state objectives and policies that are relevant to achieving the purpose of the Act. Section 56 suggests that the New Zealand Coastal Policy Statement is intended to give effect to the Part 2 provisions in relation to the coastal environment. A national policy statement promulgated pursuant to s 45 contains provisions relevant to achieving the Resource Management Act's purpose. The provisions are not an exclusive list of relevant matters and they do not necessarily encompass the statutory purpose. In this regard I note that a number of the policies relied on in this case, including Policy 10, start with the words "(i)n achieving the purpose of the Act".
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> [84] I accept the submission advanced by Ms Caldwell and Mr Allan that the NPSET is not as all embracing of the Resource Management Act's purpose set

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179 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [77]–[84].
180 At [77]–[78].
181 At [82].

> out in s 5 as is the New Zealand Coastal Policy Statement. In my judgment, a decision-maker can properly consider the Resource Management Act's statutory purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the Resource Management Act. They are not however entitled to ignore the NPSET; rather they must consider it and give it such weight as they think necessary.

Regional and District planning instruments

[105] Regional and District planning instruments sit below the national policy statements but are more detailed in their provisions. The RCEP is required by s 67(3)(b) of the RMA to give effect to the NZCPS and national policy statements including the NPSET. The RCEP sets out issues, objectives and policies in relation to the coastal environment in the Bay of Plenty regarding the same three sets of values as the NZCPS and taking into account the requirements of the NPSET. The relevant provisions of the RCEP involve the same three sets of values involved in the NZCPS noted above.

[106] Consent authorities consider the granting of consents under s 104 of the RMA, which provides that "the consent authority must, subject to Part 2, have regard to: actual and potential effects on the environment of allowing the activity; relevant provisions of planning instruments; and any other matter it considers relevant and necessary". Here, the Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009 (NESETA Regulations) specify what activities relating to existing transmission lines are permitted, controlled, restricted discretionary, discretionary, or non-complying. They are national environmental standards made under s 43 of the RMA and take precedence over the District Plan, under s 43B. Transpower's proposal here involved controlled, restricted discretionary or discretionary activities under the NESETA Regulations.[182]

[107] The Tauranga City Plan is a District Plan for the purposes of s 43AA of the RMA. Its purpose is to enable the Council to carry out its functions under the RMA. Relevant provisions are included in the Annex. They involve the same three sets of values involved in the NZCPS and RCEP.

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[182] Environment Court, above n 1, at [55] and Table 1.

The Court's treatment of the planning instruments

[108] The Environment Court agreed that the RCEP is comprehensive, has been tested and "provides a clear policy framework and consenting pathway for these applications."[183] Accordingly, its "evaluation of the statutory provisions focusses on the relevant policies in the RCEP". It also addressed the higher order policy documents and the District Plan.

[109] After outlining the NPSET and the NZCPS in its decision, the Environment Court noted the *Transpower New Zealand Ltd v Auckland Council* decision. Despite its later recourse to an overall judgment approach, the Court said:

> [77] There is no basis on which to prefer or give priority to the provisions of one National Policy Statement over another when having regard to them under s 104(1)(b) RMA, much less to treat one as "trumping" the other. What is required by the Act is to have regard to the relevant provisions of all relevant policy statements. Where those provisions overlap and potentially pull in different directions, then the consent authority or this Court on appeal, must carefully consider the terms of the relevant policies and how they may apply to the relevant environment, the activity and the effects of the activity in the environment.

[110] The Court noted no party had identified any policy in the RPS which set out anything not otherwise found in the other planning instruments. It noted the RCEP gives effect to the RPS through more specific direction, and there was no contest in relation to any of the RPS provisions.[184] Therefore, it did not quote any of the RPS provisions. It set out relevant provisions of the RCEP. It considered it should have regard to the District Plan and iwi management plans and outlined some of their relevant provisions.

[111] The Court addressed the issue of whether the proposal is a maintenance project or an upgrade, and whether it includes new infrastructure, for the purposes of Policies 4 and 6 of the NPSET.[185] It agreed with expert evidence that the proposal is a "substantial" rather than "major" upgrade and that it is not new infrastructure.[186] The

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183 At [68].
184 At [78].
185 From [145].
186 At [150].

Court also said it was guided by Policies 7 and 8 of the NPSET but concluded those policies were not determinative. They are expressed to deal with the planning and development of the transmission system, which "indicates these policies relate to future and new works rather than to upgrades of the existing system".[187]

[112] The Court said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui".[188]

[113] In its concluding reasoning, the Court said:

> [259] … While a range of competing concerns have been raised, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA.
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> …
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> [267] The relevant policy framework applicable to the assessment of these effects of the proposal is extensive, as set out earlier in this decision, and is not limited to Policy 15 of the NZCPS. In having regard to the statutory planning documents under s 104(1)(b) RMA we must undertake a fair appraisal of the objectives and policies read as a whole.[189] We do not accept the argument that Policy 15 would require consent to be declined or the proposal to be amended on the basis that it has adverse effects on the ONFL. As a policy, it does not have that kind of regulatory effect. In its terms, it requires avoidance of adverse effects of activities on the ONFL to protect the natural landscape from inappropriate use and development. The policy does not entail that any use or development in an ONFL would be inappropriate. The identification of what is inappropriate requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the effects of the use or development may be on the things which are to be protected.
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> [268] It is important to note that this is not a proposal to undertake and use a new intensive commercial development in an ONFL. The existing environment of the ONFL includes the existing bridge and national grid infrastructure.
>
> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how

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187 At [152].
188 At [194].
189 *Dye v Auckland Regional Council*, above n 127, at [25]; and *RJ Davidson Family Trust v Marlborough District Council*, above n 116, at [73].

> potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
>
> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcomes would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on application of the planning instruments

[114] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in not giving the more directive provisions of the NZCPS priority over the less directive provisions of the NPSET. NZCPS is a mandatory document at the top of the hierarchy of planning instruments with the purpose under s 56 of achieving the purpose of the RMA. It could have, but did not, refer specifically to NPSET. The NPSET states objectives and policies that are only relevant to achieving the purpose of the RMA. The NPSET is not as all-embracing of the RMA's purpose. It was intended to be only a guide for decision-makers — a relevant consideration, subject to pt 2, which is not to prevail over the RMA's purpose. Accordingly, if one national policy statement has to give way to another, the NPSET must give way to the NZCPS, particularly Policy 15.

(b) The Court erred in finding that the proposal constitutes a substantial, rather than a major, upgrade and that it is not new infrastructure. This follows from the extent of works proposed in a different location, amounting to almost 40 new structures and several kilometres of lines, the benefit to mana whenua as promoted by Transpower, and the major nature of some of the new poles such as Poles 33C and 33D.

Accordingly, the Court should have applied Policy 4 of the NPSET, which contains an "avoid" directive, rather than Policy 6.

(c) The Court failed to have regard to Policy IW 2 of the RCEP and its directive to avoid adverse effects on sites of cultural significance or to be sure that it is not possible to avoid them or not practicable to minimise them. It also failed to apply NH 4, which provides that adverse effects on the values and attributes of ONFLs must be avoided. Policy SO 1 confirms the primacy of IW 2 and NH 4.

[115] Mr Beatson, for Transpower, submits:

(a) There is no difference in the status of the NZCPS and the NPSET. When they are both engaged and read together, the specific overrides the general, according to *EDS v King Salmon* and *Transpower New Zealand Ltd v Auckland Council.* Therefore, the "reduce existing adverse effects" language in Policy 6 and "seek to avoid" language of Policy 8 of the NPSET should be preferred over the NZCPS "avoid". Making anything of the silence of NZCPS as to NPSET is a speculative and fruitless exercise.

(b) There is no bottom line, or absolute policy of avoidance of all adverse effects, in Policy 15(a) of the NZCPS. That policy directs that the adverse effects of *inappropriate* development should be avoided, which is context-dependent. The Court assessed the proposal against Policy 15(a) and other instruments. Policy IW 2 of the RCEP does not have direct relevance to this ground of appeal because it does not reference the criteria in set 2 to the RPS. The Court accepted Ms Golsby's expert planning evidence for the Council that Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them.[190]

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[190] Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

(c) In any case, the RCEP gives effect to both the NZCPS and NPSET, as it is required to do by s 67(3) of the RMA. It reconciles the tensions between them. As the Environment Court held in *Infinity Investment Group Holdings Ltd v Canterbury Regional Council*, higher order instruments should be regarded as particularised in the relevant plan unless there is a problem with the plan itself.[191]

(d) The Court presumably did not engage with Policies NH 4, NH 5 and NH 11 on the basis of the evidence that effects on the ONFL were avoided. If NH 4 is triggered, Policies NH 5(a) and NH 11(a) provide an alternative consenting pathway. Transpower adopts the Councils' submissions on that issue. A project should not have to meet two different thresholds within the same policy context. Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them. The Court relied on the evidence of Ms Ryder for the Councils, and concluded the proposal was consistent with NH 4.[192]

(e) Even if there were adverse effects on the Māori values of ONFL 3, they would not have made a difference to the outcome. Māori values are only one part of the values and attributes associated with the ONFL. They would not necessarily lead to the conclusion there was an adverse effect on the ONFL as a whole. ONFL 3 is identified in the RCEP as having existing infrastructure located within it, which must be relevant to assessing the appropriateness of its relocation.

(f) The Court's findings that Policy 6 of NPSET had greater relevance than Policy 4, that the proposal was consistent with it, and that the finding that the proposal is a substantial upgrade, are not susceptible to being overturned on appeal unless it is clear there is no evidence to support the interpretation. This is not the case.

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191 *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35, [2017] NZRMA 479.

192 Environment Court, above n 1, at [228]–[229]. Statement of Evidence of Rebecca Keren Ryder, 11 February 2019 (CBD 202.0517).

[116] Ms Hill, for the Councils, adopts Transpower's submissions. In addition, she submits:

(a) The Environment Court correctly applied *EDS v King Salmon* by directly applying the RCEP without recourse to the NZCPS and NPSET. There is no authority requiring otherwise. The process of reconciling the NZCPS and NPSET has already been undertaken through the recent development of the RCEP. If the Court is required to re-examine whether the NH policies appropriately reconcile relevant national policy statement directions in every subsequent consent application, planning processes could be rendered futile.

(b) The Court was not required to assess the proposal against the detail of each policy such as IW 2, but to undertake a fair appraisal of the objectives and policies read as a whole. The Court did consider the proposal against the intent of IW 2. It carefully evaluated the cultural effects based on the evidence of the tāngata whenua witnesses and Mr Brown and gave considerable attention to cultural mitigation opportunities.[193] It was conscious that the existing environment includes the existing bridge and national grid infrastructure.

(c) The finding of adverse effects was not contrary to Policies IW 2 or NH 4(b) because: those policies require consideration as a whole; avoidance of adverse effects is not required by IW 2; NH 4(b) only requires avoidance of effects on the particular "values and attributes" of ONFL 3; the effect of Poles 33C and 33D does not detract from the identified factors, values, and associations with the ONFL of the whole harbour; the Māori values component of the ONFL is only one of several components; and the Court was unable to confirm there were significant effects on the Māori values of ONFL 3.

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[193] Environment Court, above n 1, at [165], [167], [194]–[220], [232], [233] and [244]–[248].

Did the Court err in applying the planning instruments?

[117] I agree it was reasonable for the Environment Court to focus particularly on the RCEP as providing a clear policy framework and consenting pathway and as giving effect to the RPS through more specific direction.[194] There are provisions of the RPS and Tauranga City Plan that are relevant but they supplement and reinforce the interpretation and application of the RCEP undertaken below. It is arguable that provisions of the Tauranga City Plan further constrain the decision.[195] But this was not the subject of submission, so I do not consider it further.

[118] The more major difficulty with the Court's decision is that, consistent with its overall judgment approach, the Court did not sufficiently analyse or engage with the meaning of the provisions of the RCEP or apply them to the proposal here. The Court rejected the proposition that the NZCPS requires consent to be declined because it does not have that regulatory effect. It suggested the regional and district plans "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable".[196] But it considered they did not "particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved".[197] Then it mentioned Policy 6 of the NPSET and suggested there is no guidance as to how "potential conflict" between the NPSET and NZCPS is to be resolved, and moved to its overall judgment.[198] As I held above, the Court's employment of the overall judgment approach, and failure to analyse the relevant policies carefully, is an error of law.

[119] The starting point is the RCEP. When they are examined carefully, the three sets of values in them can be seen to overlay and intersect with each other without conflicting.

[120] Interpreting and applying the natural heritage provisions of the RCEP:

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194 At [68] and [78].
195 For example, Policy 6A.1.7.1(g).
196 At [269].
197 At [269].
198 At [269].

(a) Issue 7 of the RCEP, which gives a clue to its purpose, is that "Māori cultural values … associated with natural character, natural features and landscapes … are often not adequately recognised or provided for resulting in adverse effects on cultural values". Consistent with Policy 15 of the NZCPS, Objective 2(a) is to protect the attributes and values of ONFL from inappropriate use and development "and restore or rehabilitate the natural character of the coastal environment where appropriate".

(b) Te Awanui is identified in sch 3 of the RCEP as ONFL with medium to high Māori values, "a significant area of traditional history and identity" and as including "many cultural heritage sites", many of which are recorded in iwi management plans and Treaty settlement documents. That is reinforced by the recognition in the Tauranga City Plan of Te Ariki Pā/Maungatapu as a significant area for Ngāti Hē in terms of mauri, wāhi tapu, kōrero tuturu and whakaaronui o te wa. I found in Issue 2 that the proposal would constitute a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3.

(c) The natural heritage policies include a requirement on decision-makers in Policy NH 4 to avoid adverse effects on the values and attributes of the OFNL, in order to achieve Objective 2: protecting the attributes and values of ONFL from inappropriate use and development. This is consistent with and reflected in the Tauranga City Plan, as it must be. As noted in relation to Issue 2, I consider the proposal's adverse effect on Ngāti Hē's values in ONFL 3 would constitute an adverse effect on the ONFL.

(d) Under Policies NH 4A and 9A respectively:

(i) The assessment of adverse effects should: recognise the activities existing at the time the area was assessed as ONFL and have regard to the restoration of the affected attributes and

values and the effects on the cultural and spiritual values of the tāngata whenua.

(ii) Recognise and provide for Māori cultural values, including by "avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape", "assessing whether restoration of cultural landscape features can be enabled", and "applying the relevant iwi resource management policies". Those policies object to power pylons and emphasise that "Marae provide the basis for the cultural richness of Tauranga Moana".[199]

(e) So, if a proposal is found to adversely affect the values and attributes of the ONFL having regard to all those considerations, as I have held this one does, the default decision is that it should be avoided under NH 4.

(f) But, nevertheless, Policy NH 5(a)(ia) requires decision-makers to "consider providing for" proposals that relate to the construction, operation, maintenance, protection or upgrading of national grid, even though will adversely affect those values and attributes. Policy 11(1) in turn sets out the requirements for NH 5(a) to apply, including that:

> (a) There are no practical alternative locations available outside the areas listed in Policy NH 4; and
>
> (b) The avoidance of effects required by Policy NH 4 is not possible; and
>
> …
>
> (d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and
>
> (e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

[199] Ngāi Te Rangi Resource Management Plan. See also Te Awanui Tauranga Harbour Iwi Management Plan 2008 (Objective 1, Policies 1, 2, 10), Tauranga Moana Iwi Management Plan 2016 (Policies 15.1, 15.2, 15.4).

(g) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, if all the circumstances specified in NH 11 apply, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A (including the iwi management plans).

[121] The Iwi Resource Management Policies of the RCEP must also be applied:

(a) Schedule 6 of the RCEP identifies Te Awanui as an ASCV, with reference to iwi management plans and other historical documents and Treaty settlement documents.

(b) Policy IW 1 of the RCEP requires proposals "which may" affect the relationship of Māori and their culture, traditions and taonga, to "recognise and provide" for" areas of significant cultural value identified in sch 6, and other sites of cultural value identified in hapū resource management plans or evidence. Policy IW 5 provides that "only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga".

(c) Similarly, but slightly differently to Policy NH 4, Policy IW 2 requires "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS" to be avoided as a default. As Advice Note 2 states, ASCVs are likely to strongly meet one or more criteria in Appendix F. Unlike the ONFL, the ASCV applies directly to the land on which the Marae is situated. I held in Issue 2 that the proposal constitutes a significant adverse effect on an area of cultural significance to Ngāti Hē.

(d) The qualification in IW 2 is that, where avoidance is "not practicable", the adverse effects must be remedied or mitigated. Where that is not possible either, it may be that offsetting positive effects can be provided. Policy 7C.4.3.1 of the District Plan expands slightly on that.

[122] The issues, objectives and policies related to activities in the coastal marine area must also be interpreted and applied:

(a) Issue 40 recognises that activities in the coastal marine area can promote social, cultural, and economic wellbeing, may need to be located in the coastal marine area in appropriate locations and in appropriate circumstances, but may cause adverse effects.

(b) Policy SO 1 recognises infrastructure is appropriate in the coastal marine area but that is explicitly made subject to the NH and IW policies "and an assessment of adverse effects on the location", which involve the practicability tests as above. That is reinforced by Objective 10A.3.3 and Policies 10A.3.3.2(c) and 10A.3.3.2(d) of the District Plan that minor upgrading of electric lines "avoids or mitigates" and "address[es]", respectively, potential adverse effects. Objective 10B.1.1 and Policy 10B.1.1.1 of the District Plan provides that adverse effects should be "avoided, remedied or mitigated to the extent practicable". Policy 10A.3.3.1 requires network utility infrastructure to be placed underground unless certain conditions apply.

[123] So, read carefully together, the iwi resource management policies are consistent with the natural heritage policies and with the structures and occupation of space (SO) policies:

(a) Policy IW 2 of the RCEP requires that adverse effects on areas of spiritual, historical or cultural significance to tāngata whenua must be avoided "where practicable". The Environment Court erred in failing to interpret and apply Policy IW 2. This is not a matter of evidence, however expert. Expert witnesses cannot and should not give evidence on issues of law, as it appears Ms Golsby was permitted to do.[200] The interpretation and application of the law is a matter for the Court.

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[200] Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

(b) Similarly, Policies NH 4 and 4A of the RCEP require that "adverse effects must be avoided on the values and attributes of ONFL". However, a decision-maker can still consider providing for a proposal in relation to the national grid if, under NH 5(a)(ia) and NH 11(1), there are "no practical alternative locations available" outside the areas listed in NH 4, the "avoidance of effects" is not possible, and "adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements". The Court did not apply these either.

(c) I do not accept the submission that there cannot be two different thresholds in the IW and NH policies. The thresholds are similar and must each be satisfied for the proposal to proceed.

(d) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, in the circumstances specified in NH 11, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A.

(e) Under Policy SO 1, the analysis of adverse effects overrides the default approach that infrastructure is appropriate in the coastal marine area. Policy SO 2 also invokes the requirements of both the NZCPS and NPSET.

[124] The last point expressly directs reference to the "requirements" of NZCPS and NPSET. Even if it did not, as I held in Issue 3, a Court will refer to pt 2 and higher order planning instruments if careful purposive interpretation and application of the relevant policies requires that. But it is wrong to turn first to the NZCPS and NPSET. Whether consent needs to be declined depends on an application of the RCEP (and District Plan) provisions interpreted in light of the NZCPS and NPSET.

[125] I agree with the Environment Court that the NZCPS itself does not necessarily require consent to be declined.[201] That is clear on the face of the relevant policies and because of the operative role of the RCEP. I also agree with the Court that, in relation

[201] Environment Court, above n 1, at [267].

to the issues at stake here, neither the NZCPS nor the NPSET should necessarily be treated as "trumping" the other and neither should be given priority over or "give way" to the other.[202] As the Supreme Court in *EDS v King Salmon* stated, their terms should be carefully examined and reconciled, if possible, before turning to that question. It may be that, in relation to a specific issue, the terms of one policy or another is more specific or directive than another, and accordingly bear more directly on the issue, as counsel submit. In *Transpower New Zealand Ltd v Auckland Council,* Wylie J characterised the NPSET as providing relevant considerations in general.[203] I agree that a number of the policies do that. And it may be that the NPSET is not as "all embracing" of the RMA's purpose as the NZCPS.[204] But the terms of both national policies inform the interpretation and application of the relevant planning instrument to the specific issue in determining the outcome, as Wylie J demonstrated.[205]

[126] I do not agree with the implication of the Environment Court's reasoning that the NZCPS and NPSET conflict in their application to this proposal.[206] I accept the submissions of Mr Beatson and Ms Hill that, in relation to this issue, the RCEP gives effect to the NZCPS and NPSET and reconciles them. I consider their requirements are consistent with each other as expressed in both the RCEP and District Plan. In more detail:

(a) Objective 2 and Policy 15 of the NZCPS, as interpreted by the Supreme Court in *EDS v King Salmon*, reinforce the nature of the natural heritage policies of the RCEP as bottom lines in requiring adverse effects to be avoided. The circumstances in which use and development are "appropriate" under Policy 15 are set out in the RCEP. Adverse effects should be avoided, but may be considered if no practical alternative locations are available, avoidance of adverse effects is not possible and they are avoided to the extent "practicable".

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202 At [77].
203 *Transpower New Zealand Ltd v Auckland Council,* above n 179, at [82].
204 At [84].
205 At [85]–[104].
206 Environment Court, above n 1, at [269].

(b) Objective 3 and Policy 2 of the NZCPS, as outlined above, reinforce the Iwi Resource Management policies of the RCEP as cultural bottom lines in requiring adverse effects to be avoided unless "not practicable".

(c) Objective 6 and Policy 6 of the NZCPS reinforce the recognition in Issue 40 and Policies SO 1 and SO 2 of the importance to well-being of use and development of electricity transmission in "appropriate places and forms" on the coast or coastal marine area and within "appropriate limits". Policy 6 specifically references the need to make "appropriate" provision for marae and associated developments of tāngata whenua, to "consider how adverse visual impacts of development can be avoided" and "as far practicable and reasonable" apply controls of conditions to avoid those effects. Policy 6 also recognises that activities with a "functional need to be located in the coastal marine area" should be, in "appropriate" places, and those that do not, should not.

(d) The NPSET similarly recognises the national significance of electricity transmission while managing its adverse effects. Policies 2, 5, 6, 7 and 8 put requirements on decision-makers. But Policy 2 is general in requiring that they "recognise and provide for the effective operation" etc of the network. Policy 5 is more specific in requiring decision-makers to "enable the reasonable operational, maintenance and minor upgrade requirements of transmission assets when considering environmental effects. That is consistent with the general requirements of the NZCPS as expressed in the more detailed regime for doing so set out in the RCEP and District Plan. Policy 6 is relative, in requiring decision-makers to "reduce" existing adverse effects where there are "substantial upgrades of transmission infrastructure". And Policies 7 and 8 are consistent with the NZCPS and RCEP in requiring decision-makers to "avoid" or "seek to avoid" certain adverse effects.

[127] I do not consider Mr Gardner-Hopkins' submission that the Court erred in finding the proposal constitutes a "substantial" rather than "major" upgrade makes much difference to the outcome. Policy 4 of the NPSET requires decision-makers to

"have regard" to the extent to which adverse effects of major upgrades have been minimised, which must be relevant anyway, under other provisions. Policy 6 adds an element of proactivity in requiring "substantial upgrades" to be used as an opportunity to "reduce existing adverse effects". Each bears on the outcome of the application, but neither is determinative. If it does matter, I consider it was open to the Court to find the proposal was a "substantial" upgrade on the basis of the evidence before it. I am more dubious about the Court's conclusion that Policies 7 and 8 relate only to future and new works rather than to upgrades of the existing system. I see no reason why upgrades do not involve planning of the transmission system and the purpose of those policies, of avoiding adverse effects, may apply to upgrades.

[128] More generally, to the extent that there is room for differences to be found between the NZCPS and NPSET, both instruments are reconciled and given effect in the RCEP and District Plan. But the Court needed to carefully interpret the RCEP and apply it to the facts here, as outlined above, in light of the higher order instruments. Reference to the general principles in pt 2 of the Act, particularly ss 6(e), 7(a) and 8, simply confirms the analysis undertaken above.

[129] I found in Issue 2 that as a matter of fact and law, the proposal would have a significant adverse effect on an "area of spiritual, historical or cultural significance to tāngata whenua" and a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL. That means the bottom lines in Policies IW 2 and NH 4 of the RCEP respectively may be invoked:

(a) Under IW 2, the adverse effects on Rangataua Bay as an "area of spiritual historical or cultural significance to tāngata whenua" must be avoided "where practicable".

(b) Under NH 4, NH 5(a)(ia) and NH (11), the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 must be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

[130] So, whether the cultural bottom lines in the RCEP are engaged depends on whether the "practicable", "possible" and "practical" thresholds are met. That requires consideration of the alternatives to the proposal, which is the next issue.

Issue 5: Was the Court wrong in its assessment of alternatives?

[131] In this issue I deal with the grounds of appeal regarding whether the Court erred in failing to adequately consider alternatives and whether it erred in law in considering the status quo was the obvious counterfactual. Both of those issues relate to how the Court assessed the alternatives.

Law of alternatives

[132] In *EDS v King Salmon*, the Supreme Court considered whether a decision-maker was required to consider alternatives sites when determining a site-specific plan change that is located in, or fails to avoid, significant adverse effects on an ONFL.[207] It considered previous case law, including the High Court's judgment in *Meridian Energy Ltd v Central Otago District Council*, which rejected the proposition that alternatives must be considered.[208]

[133] The Supreme Court held that consideration of alternatives may be necessary depending on "the nature and circumstances" of the particular application and the justifications advanced in support of it.[209] If an applicant claims that an activity needs to occur in the coastal environment and it would adversely affect the preservation of the natural character, or that a particular site has features that make it especially suitable, the decision-maker ought to test those claims. That will "[a]lmost inevitably" involve consideration of alternative localities.[210] In that case, it considered the obligation to consider alternatives sites arose from the requirements of the NZCPS and sound decision-making, as much as from s 32 of the RMA.[211]

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207 *EDS v King Salmon*, above n 112, at [156].
208 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
209 *EDS v King Salmon*, above n 112, at [170].
210 At [170].
211 At [172].

The Environment Court's treatment of alternatives

[134] In its decision, the Environment Court stated:[212]

> [46] Transpower considered a range of options for taking the transmission line across Rangataua Bay including bridge or sea bed cable options as well as the aerial crossing option. The bridge and sea bed options were rejected for reasons that included costs being between 10 and 20 times more than those of an aerial crossing, programming issues, health and safety effects and access and maintenance considerations.

[135] In its second preliminary issue section, the Court considered whether it was necessary for Transpower to consider alternative methods for realignment of the A-Line and, if so, whether its assessment and evaluation was adequate.[213] In summary, the Court said:

(a) An assessment of alternatives "may be relevant" under s 104(1)(a) of the RMA if the adverse effects are significant or, under the RCEP, if there are adverse effects of an activity on the values and attributes of ONFL 3.[214] The Court referenced Policies NH 4 and NH 5.

(b) It noted that the identification of the attributes of ONFL 3 in sch 3 of the RCEP recognises that the current uses of ONFL 3 includes national grid infrastructure.[215] It considered it may follow, "in the absence of any policy for the removal of such uses", that it "might be considered to be generally appropriate within it on the basis that they do not undermine or threaten the things that are to be protected".[216] This does not take into account IW 2, NH 4, NH 5 and NH 11(1).

(c) The Court considered "an applicant is not required to undertake a full assessment or comparison of alternatives, or clear off all possible alternatives, or demonstrate its proposal is best in net benefit terms"

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212 Environment Court, above n 1, at [46], citing Transpower's Assessment of Effects on the Environment, above n 32.
213 At [113].
214 At [115].
215 At [116].
216 At [116].

and "[a]ll that is required is a description of the alternatives considered and why they are not being pursued".[217]

(d) The Court considered a list of seven options considered by Transpower in Table 2, entitled "Principal options considered by Transpower":

Option	Option Description	Comments
1	Do nothing	Poles A116 and A117 will still require replacement. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
2	Underground cable between Poles A116 and A117 on Ngāti Hē land (sports field)	Would require two new cable termination structures to replace Poles A116 and A117. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
All remaining options below involve relocation of the circuit onto or adjacent to the HAI-MTM-B support poles between poles B28 and B48, and removal of redundant HAI-MTM-A line poles from Te Ariki Park, residential and horticultural land.		
3(a)	Aerial crossing of Rangataua Bay in a single span.	Requires two monopoles of approximately 34.7 m on the Maungatapu side and 46.8 m high on the Matapihi side, and removal of the existing Tower A118 from the CMA.
3(b)	Aerial crossing of Rangataua Bay utilising a strengthened or replacement Tower A118 in the CMA.	Requires one monopole of up to 40 m high on the Maungatapu side of the harbour and a 12m to 17m high concrete pi-pole on the Matapihi side. Existing Tower A118 in the CMA is retained.
4(a)	Integrate a cable into a potential future replacement road bridge.	New cable termination structures required on either side in the order of 15m to 20m high. New bridge would need to be designed to accommodate an additional transmission cable.
4(b)	Cable across estuary on a new stand-alone footbridge or cable bridge	New cable termination structures required on either side in the order of 15m to 20m high. New bridge structure required.
4(c)	Cable across existing bridge - east side	New cable termination structures required on either side in the order of 15m to 20m high. Terminate on

[217] At [117].

		west side adjacent to Marae, but then cross to east side (opposite side to existing cable) as soon as practicable. Thrust bore under road required.

(e) The Court recorded that Transpower rejected option 2 for cultural reasons and lack of wider benefits.[218] Transpower rejected the options attaching a cable to the bridge or beneath the seabed for reasons of operational and security of supply risk, unacceptable costs and the need for substantial termination structures on either side of the waterway. Transpower shortlisted the two aerial crossing options. Its preferred option was the single span, option 3(a).

(f) The Court considered in some detail the potential alternatives of under-seabed and bridge-attachment cables because they were particularly mentioned by TEPS, the Marae and Ngāi Te Rangi.[219] The cost of the bridge-crossing option was estimated by Transpower at more than 10 times that of the aerial crossing.[220] The costs of undergrounding was "at least an order of magnitude more" than an aerial route.[221] On that basis, the Court considered these alternatives were "impracticable".[222]

(g) The Court held that "[a] relocated A-Line crossing of the harbour on a strengthened existing bridge would appear to be technically feasible".[223] But it considered that the cost alone meant Transpower "has a clear reason for discounting a bridge option".[224] It considered imposing a condition requiring that cost "could well be unreasonable" and "would also be likely to go beyond the Court's proper role in adjudicating disputes under the RMA".[225] The Court considered that, if it were to conclude that level of expenditure was necessary to avoid,

218 At [122].
219 At [123] and [124]–[137].
220 At [130].
221 At [136].
222 At [265].
223 At [138].
224 At [139].
225 At [140].

remedy or mitigate the adverse effects "then the more appropriate course could be to refuse consent to the proposal".[226] It accepted Transpower's dismissal of the under-sea options on the same basis.

(h) The Court considered all of the alternatives would place tall structures in the ONFL "whether above or below it or on its margins".[227]

(i) Accordingly, it concluded "the alternatives to have been appropriately assessed and the reasons for the selection of the project on which Transpower wishes to proceed to be sound".[228]

[136] Later, in considering the cultural effects of the proposal, the Court held that the alternatives may have greater effects on the values and attributes of the harbour than the proposal.[229] In acknowledging Ngāti Hē's view that the effects of a new Pole 33C outweigh the benefits of the A-Line removal, the Court said "there is no certainty that a proposal they can support will come forward, and if it does, whether it will achieve the outcomes they desire".[230] It noted evidence, though not from NZTA, that NZTA has no plans to upgrade the bridge to a standard that could support the lines.[231] The Court also said:

> [219] Transpower has in effect said that it will walk away from the realignment project altogether if the appeal is granted. It would then strengthen or replace its infrastructure on Te Ariki Park which is work that does not require any further consent. We have no ability to require that they do otherwise. We do not regard this as any kind of threat or otherwise as an inappropriate position: it simply recognises that if an activity requires resources consent but cannot obtain it, then not undertaking that activity is an obvious option for the unsuccessful applicant.

[137] As noted in relation to Issue 4, in its concluding reasoning, the Court said:

> [265] The alternatives of laying the re-located A-Line on or under the seabed or in ducts attached to the Bridge appear from the evidence to be impracticable. While technically feasible, the uncontroverted evidence is that the works involved would entail costs of an order of magnitude greater than the estimated costs of Transpower's proposal. We have already found that we

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226 At [140].
227 At [143].
228 At [144].
229 At [213].
230 At [214].
231 At [215].

> do not have the power to require Transpower to amend its proposal in a manner that would result in a cost increase of that kind. To do that would go beyond the scope of the power to impose conditions on the proposal as it would effectively result in a new proposal.

[138] And, in the last two sentences of its last paragraph, the Court said:

> [209] … In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on alternatives

[139] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) It is accepted there is a functional need for the lines to cross Rangataua Bay at some location. But Transpower did not try very hard to consider alternatives. It did not commission a detailed investigation as to whether strengthening the bridge would feasibly accommodate the A-Line. Its costs were "back of the envelope" figures provided by email.

(b) The RCEP's requirements that adverse effects be avoided in the IW 2 and NH 11 policies mean the Court must satisfy itself there are not possible alternatives or no practicable alternatives that would avoid the adverse effects. The terms "not practicable" and "not possible" in Policies IW 2 and NH 11 establish a very high threshold. The term "not possible" must impose a higher threshold than "not practicable". The threshold in NH 11(1)(d) is not met because it only requires having regard to technical and operational requirements.

(c) The Environment Court did not engage with what it understood the two terms to mean. It simply listed the relevant policies, applied the *Meridian Energy* test, and made no assessment of the requirements. It dismissed the bridge and under-sea alternatives solely for cost reasons, but cost is not the determining element — its weight depends on the context. The Court made no findings as to whether the bridge and

under-sea alternatives were "possible" or "practicable", or what they mean in the regulatory context here, so it failed to have regard to Policies IW 2 and NH 11.

(d) It would accord with the spirit of pt 2 of the RMA, consistent with *McGuire*, to prefer an alternative. Transpower's 2017 Options Report identifies two alternative ways of achieving the project while avoiding the adverse effects required to be avoided by IW 2. They would involve using a cable across the bridge, with a termination structure of, at most, half the height of the proposed structures, some distance away from the Marae.[232] It was not established that the termination structures of these alternatives, however "Dalek-like" (as apparently discussed at the Environment Court hearing), would need to be placed where Pole 33C is proposed to go or whether they could go in a different location, further away from the Marae.

(e) Posing the status quo as the obvious counterfactual was a mistake, given the evidence. At the least, the Court should have acknowledged that declining consent would not necessarily deprive Ngāti Hē and others of the benefits of the current proposal in removing the A-Line alignment across Rangataua Bay. But it is unlikely the status quo would be maintained, given the evidence that Pole 117, on a cliff face, is subject to erosion and episodic erosion events of three to six metres at a time.

(f) Mr McNeill, Transpower's Investigations Project Manager, agreed that if Transpower had known the proposal did not have Ngāti Hē and Maungatapu Marae support, it would have said "no way" and would "continue to meet and to, yeah, come up with other proposals…".[233] Ms Raewyn Moss, a General Manager at Transpower, gave evidence that Transpower would need to consider whether to proceed with the

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232 Transpower New Zealand Ltd *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Taurauga* (July 2017) at 16–18 (CBD 304.1087–304.1089).

233 NOE 34/19–21.

Matapihi aspect of the proposal if that was the only aspect granted consent.[234] Another Transpower witness confirmed it was possible from an engineering perspective, with modification to how the lines connected.[235]

(g) Transpower has an obligation to address the historical breach of the Treaty of Waitangi, especially given the assurance that the A-Line would be relocated to the new B-Line path when the B-Line was proposed some 25 years ago. Otherwise, the existing bridge and motorway will be a justification for further infrastructure being located alongside them with further negative cumulative effects.

[140] Mr Beatson, for Transpower, submits:

(a) The approach in *Meridian Energy Ltd* is correct. Transpower undertook a comprehensive analysis of all technically viable alternative options. "Practicable" imports feasibility, viability, and cost considerations. In NH 11(1), "practicable" is clearly informed by Transpower's technical and operational requirements.

(b) Transpower satisfied the requirements of NH 5 and NH 11, given avoidance of all effects is not possible and adverse effects are avoided to the extent practicable. Ugly termination structures of 23 metres, characterised as "Daleks" would be required for any alternate option.[236] The alternatives of laying the relocated A-Line on or under the seabed or attached to the bridge were found to be impracticable, not solely for cost reasons. The Court's findings were reasonable and supported by evidence.

(c) The Court was entitled to rely on, and prefer, the evidence of Transpower as to its plans and ability to retain the existing A-Line alignment if consent is declined. Mr McNeill's comments provide no

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234 NOE 27/12–15.
235 NOE 114/10–20.
236 Evidence of Richard Joyce (1 February 2019) (CB 203.623) at [28] and following photograph.

guarantee unspecified alternatives would have been pursued. Ms Moss provided clear statements that Transpower would maintain Poles 116 and 117.[237] It is not clear whether it would be practically possible to split the Matapihi and Maungatapu aspects of the proposal.

(d) Mr Thomson confirmed maintenance of the A-Line is achievable if realignment does not proceed, with Pole 117 being relocated further inland.[238] The Court accepted Transpower could apply for a new consent for the anchor blocks associated with Pole 117 and continue to operate until all appeals were determined. Mr Beatson advises this is what has transpired. The Court also noted other regulatory avenues open to Transpower to secure the failing poles.

(e) What Transpower is trying to do is entirely consistent with *McGuire.* It has worked extremely hard to come up with a solution that it felt struck the right balance between cost and resolving the ongoing source of contention. It put it forward in good faith and got agreement and still considers it is a suitable response. There is no legal obligation on Transpower to move the A-Line under the RMA. Transpower does not have the obligations of the Crown under s 9 of the State-Owned Enterprises Act 1986 and there has been a Treaty settlement with Ngāi Te Rangi. Transpower would not be creating an additional transgression by maintaining the A-Line where it is. But dialogue with Ngāti Hē would continue in any case.

[141] Ms Hill, for the Councils, submits:

(a) *Meridian Energy* does not require all possible alternatives to be evaluated nor proof that the intended proposal is the best of the alternatives. Avoidance of adverse effects to the "extent practicable"

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237 Statement of Evidence of Raewyn Moss, 1 February 2019 at [38] (CBD 203.0612); and NOE 15/18–22.

238 Statement of Evidence of Colin Thomson, 1 February 2019 at [26] (CBD 203.645).

under NH 11(d) and NH 11(e) clearly relates to the particular proposal rather than to alternatives.

(b) The Environment Court did not dismiss particular options but assessed the adequacy of Transpower's consideration of them and whether a clear rationale for discounting an option was provided.[239] It set out detailed reasons why Transpower discounted particular options. It clearly considered whether avoidance of adverse effects was "not possible" having regard to the alternatives.[240] The Court assessed mitigating or offsetting adverse effects and found the alternatives were impracticable. It found the alternatives may affect the values and attributes of the harbour to a greater extent than the aerial line, and avoidance of adverse effects was not possible under any scenario.

(c) The Councils adopt the submissions of Transpower in relation to the status quo issue. In addition, it is difficult to know how such an error, if established, would be material to the outcome. Even if the prospect of the A-Line remaining is less certain than the Court considered it to be, the Court would be unable to establish there is another feasible alternative to the status quo with the requisite certainty or to direct Transpower to implement that.

Did the Court err in its treatment of alternatives?

[142] As determined in Issue 4, both the IW 2 and NH 4 Policies of the RCEP require consideration of whether it is "practicable" and "possible" to avoid adverse effects and whether alternative locations are "practical". If it is practicable to avoid the proposal's adverse effects on the area of spiritual, historical or cultural significance to Ngāti Hē, the proposal must not proceed under Policy IW 2. If there are practical alternative locations of the infrastructure, or it is possible to avoid the proposal's adverse effects on the Māori values of Te Awanui as ONFL 3, then the proposal must not proceed under Policy NH 4, NH 5(a)(ia) and NH 11(1)(a) and (b).

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239 Environment Court, above n 1, at [46] and [144].
240 At [143].

[143] Either way, applying *EDS v King Salmon*, the practicability, practicality, and possibility of alternatives is a material fact which directly affects the available outcome of the application. This is more than something that "may be relevant" as the Court characterised them.[241] *EDS v King Salmon* has overtaken *Meridian Energy* in that regard. In this context, given the nature of the application and the relevant law, the Court was legally required to examine the alternatives in order to determine whether they are practicable, practical and possible with respect to the meaning of those terms in the relevant policies of the RCEP. Furthermore, the Court is required to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal. The Court's findings would determine whether the relevant adverse effects must, as a matter of law, be avoided under Policies IW 2 and NH 4 of the RCEP.

[144] In *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc*, the Supreme Court considered the meaning of "practicable" in the context of the Civil Aviation Act 1990:[242]

> [65] 'Practicable' is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the importance of context to determining its meaning. Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the relevant airport, including the context in which the request for the Director's acceptance is made.

[145] The Environment Court dealt with practicability rather differently. In its conclusion, the Court considered that the alternatives favoured by Ngāti Hē were technically feasible but would "entail costs of an order of magnitude greater" than the proposal.[243] It therefore concluded, apparently because it did not consider it had the power to require Transpower to amend its proposal, that the alternatives "appear from

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241 At [115].

242 *Wellington International Airport Ltd v New Zealand Air Line Pilots Association Inc Industrial Union of Workers* [2017] NZSC 199, [2018] 1 NZLR 780.

243 Environment Court, above n 1, at [46] and [265].

the evidence to be impracticable".[244] The Court determined that, when faced with a range of competing concerns and no possible outcome would be wholly without adverse effects, it had to decide which outcome better promotes the sustainable management of natural and physical resources as defined in s 5 of the RMA.[245]

[146] The Court misdirected itself in law by not interpreting and analysing the "practicable", "possible" and "practical" in the context of the policies and the proposal. It erred in failing to recognise that the practicability, practicality or possibility of alternatives are directly relevant to whether the proposal could proceed at all.[246]

[147] The "practicability" of avoiding adverse effects in Policy IW 2 relates to cultural values. The emphasis on the Treaty of Waitangi and cultural values, and potential for cultural bottom lines in the RMA and planning instruments suggests that cultural values should not be underestimated. Issue 7 of the RCEP suggests they are "often not adequately recognised or provided for". It is always difficult to put a price on culture, which is what is implied in a finding that the cost of an alternative is "too" high. That conclusion should not be too readily reached. And a conclusion has to be that of the Court, not of the applicant. But the cost of network infrastructure is eventually felt by all electricity consumers, as well as the Crown. I do not consider, in this context, that cost must be irrelevant to practicability or to practicality.

[148] What cost is "too" high to satisfy an alternative not being "practicable" is a matter of fact and degree to be assessed in the circumstances. I do not rule out the possibility that, if the Court had itself examined robust costings of the alternatives, it may still have concluded the cost to be too high to be "practicable". I do not consider the reference in NH 11(d) to having regard to technical and operational requirements excludes the possibility of having regard to cost implications. A court would have to consider and weigh that. For the same reason, it may reasonable for a court to conclude that no "practical" alternative locations are available. It is hard to draw a meaningful distinction between "practical" and "practicable" in this context.

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244 At [265].
245 At [270].
246 At [265].

[149] But the requirement of Policy NH 11(1)(b), that "the avoidance of effects required by Policy NH 4 is not possible", does not involve an assessment of costs. The plain meaning of "possible" in NH 11(1)(b) suggests that if an alternative is technically feasible it is possible, whatever the cost. That interpretation is reinforced by the use of "practical" in NH 11(1)(a) and "practicable" in NH 11(d). This interpretation is not inconsistent with the wording of NH 11(1)(a) because (a) relates to the practicality of alternative locations while (b) relates to the possibility of avoidance of effects. It is not inconsistent with NH 11(1)(d) and (e) because they relate to the avoidance, remedying or mitigation of all "adverse effects" to the extent practicable, while (b) requires the avoidance of effects required by Policy NH 4 to be possible. Policy NH 4 relates to the values and attributes of ONFL, which are different. It is the values and attributes of the ONFL that are the subject of the cultural bottom line in Policy 15(a) of the NZCPS, supported by pt 2 of the RMA.

[150] So, the technical feasibility of the alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. Policy NH 11(1)(b) is therefore not satisfied and consideration of providing for the proposal under Policy NH 5 is not available.

[151] I also consider the Court's consideration of the alternatives was focussed too widely on the alternatives considered by Transpower. The Court should have focussed on the precise issues that constituted the adverse effects that had to be avoided unless one of the exceptions applied. As I found in Issue 2, those effects centred on the effect of Pole 33C. What were the alternatives to the location, size and impact of that on the area of cultural significance to Ngāti Hē and the Māori values of Te Awanui at ONFL 3? Could Pole 33C be situated in a location that did not have those adverse effects but did not have the cost implications of the alternatives Transpower considered?

[152] The status quo was one of the alternatives that Transpower, and the Court, considered. The Court was obliged to consider Transpower's evidence that it would walk away from the realignment project if the appeal was granted. It was open to the Court to regard that as an obvious option for Transpower. It was not required to give greater weight to Mr McNeill's evidence or even to make a finding either way. Predicting the future of this proposal is inherently speculative. But examination of the

status quo option needed to be included in the analysis of alternatives. It was not a matter of preferring the proposal to the status quo, as the Court said. In law, it was a matter of whether the proposal was lawfully available, given the alternatives.

[153] Finally, Mr Gardner-Hopkins submits Transpower has an obligation to address the location of the transmission lines as an ongoing breach of the Treaty of Waitangi. Mr Beatson submits it does not. This was not fully argued before me and the issue is not part of the appeal, so I do not comment further. Neither do I further consider how it might affect the obligations on the decision-maker in relation to the proposal. But there is no doubt that further discussion between Transpower and Ngāti Hē over these issues would be consistent with the principles of the Treaty of Waitangi, given the unhappy history of the transmission lines at issue.

Relief

Law of relief on RMA appeals

[154] Section 299 of the RMA provides that appeals are made in accordance with the High Court Rules 2016. Rule 20.19 provides:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
>
> (a) make any decision it thinks should have been made:
>
> (b) direct the decision-maker—
>
> (i) to rehear the proceedings concerned; or
>
> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
>
> (iii) to enter judgment for any party to the proceedings the court directs:
>
> (c) make any order the court thinks just, including any order as to costs.
>
> …
>
> (3) The court may give the decision-maker any direction it thinks fit relating to—
>
> (a) rehearing any proceedings directed to be reheard; or

(b) considering or determining any matter directed to be considered or determined.

(4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it.

…

(6) The powers given by this rule may be exercised in favour of a respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.

[155] As Dunningham J observed in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*, the "usual course" is to refer the matter back to the Environment Court.[247] But "the High Court has been prepared to substitute its own decision where the outcome is inevitable and there is no need to make further factual determinations in the specialist Court".[248]

[156] In *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau*, Heath J quashed a decision imposing a condition and referred it back to the Environment Court for rehearing, leaving the rest of the decision undisturbed.[249]

[157] In *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*, Gault J said: [250]

> [207] As indicated, even if the Court finds an error of law, it must be material to the decision under appeal for relief to be granted. The Court is cautious, however, before accepting that it would be futile to remit on the basis that the outcome would be the same. That is particularly so here given the importance of the relationship of iwi and hapū with water evident in the NPSFM Preamble, and the fact that the Environment Court is the specialist tribunal best placed to assess the effects. Also, effects may be relevant to assessing appropriate conditions, not merely whether consent should be granted or declined.

Submissions on relief

[158] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the errors are material. He submits it cannot be assumed the Environment Court would reach the same decision and the matter should be referred back to it for reconsideration. He also submits that I should refuse the consent if I find the effects of the proposal are adverse

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247 *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [112].
248 At [112].
249 *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 at [69].
250 *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*, [2020] NZHC 3388.

in terms of Policy 15(a) of the NZCPS and Policies IW 2 and NH 4 of the RCEP and that Transpower has failed to demonstrate it is not practicable or possible to avoid those effects. It would only be if I definitively found that there are practicable alternatives that would avoid the adverse effects, and other errors, that I could quash the consents and not refer the matter back to the Environment Court.

[159] Mr Beatson, for Transpower, submits that the Environment Court has not made an error of law. Thus, the High Court is not able to interfere with a decision made on the merits where there is no error of law.

[160] Ms Hill, for the Councils, submits that it is not the role of the High Court to weigh the evidence or substitute its own assessment of the consistency of the proposal with a plan. If the Court finds the Environment Court erred in its approach to assessing effects, Ms Hill submits the matter should be remitted to the Environment Court to reconsider in light of this Court's directions.

Should the decision be remitted?

[161] In summary, I have concluded the Environment Court made errors of law in:

(a) its findings regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of ONFL 3;

(b) its "overall judgment" approach and treatment of pt 2 of the RMA;

(c) interpreting and applying to the proposal the cultural bottom lines in the planning instruments; and

(d) its treatment of the practicability, or practicality and possibility of avoiding the adverse effects of the proposal.

[162] These are material errors. I have determined the true and only reasonable conclusion about the adverse effects of the proposal. I have indicated the correct approach to interpreting and applying the planning instruments. I have interpreted and

applied the meaning of Policy NH 11(1)(b) in light of the Environment Court's existing findings. But the Court's findings were not premised on the legal need for it to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal.

[163] I consider it is desirable for the Environment Court to further consider the issues of fact relating to whether the alternatives to the proposal are practicable, practical or possible in light of the legal framework and the questions about the alternatives that I have identified. It is likely that further evidence on that will be required from Transpower.

[164] The interpretation of "possible" in Policy NH 11(1)(b) in this judgment suggests that, if the proposal remains as it is and the Environment Court comes to the same conclusion as it did before on the basis of further evidence about alternatives, the proposal will not proceed as it is. But further consideration of alternatives with a narrower focus on the size, nature and location of Pole 33C might lead Transpower to amend its proposal. Evidence of Ngāti Hē's considered views of any such alternatives would be required in order to determine the adverse effects of any such amendments. With goodwill, and reasonable willingness to compromise on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal.

[165] Furthermore, no issue has been taken with the part of the realignment proposal from Matapihi north. There are clear benefits to that part of the proposal, including to Ngāi Tūkairangi. If the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. There is evidence that may be possible, but the implications are not clear to me. I leave that to the Environment Court as well.

Result

[166] I quash the Environment Court's decision and remit the application to it for further consideration, consistent with this judgment.

[167] Costs should be able to be worked out between counsel. If not, I give leave for the appellant to file and serve a memorandum of up to 10 pages on outstanding issues

regarding costs within 10 working days of the judgment and leave for the respondents to file and serve a memorandum of an equivalent length within 10 days of that. If that happens, the appellant then has five days to file and serve a memorandum in reply of up to five pages.

Palmer J

Annex: Relevant planning provisions

New Zealand Coastal Policy Statement 2010

Objective 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
- identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
- encouraging restoration of the coastal environment.

Objective 3

To take account of the principles of the Treaty, recognise the role of tāngata whenua as kaitiaki and provide for tāngata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tāngata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tāngata whenua and persons exercising functions and powers under the Act;
- incorporating mātauranga Māori into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tāngata whenua.

…

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

Policy 2 The Treaty of Waitangi, tāngata whenua and Māori heritage

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

(a) recognise that tāngata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;

…

(c) with the consent of tāngata whenua and as far as practicable in accordance with tikanga Māori, incorporate matauranga Māori in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;

(d) provide opportunities in appropriate circumstances for Māori involvement in decision-making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga, may have knowledge not otherwise available;

(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and

(i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; …

(f) provide for opportunities for tāngata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment, through such measures as:

(i) bringing cultural understanding to monitoring of natural resources;

(ii) providing appropriate methods for the management, maintenance and protection of the taonga of tāngata whenua;

(iii) …; and

(g) in consultation and collaboration with tāngata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tāngata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

(i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and

(ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori . . .

Policy 6 Activities in the coastal environment

(1) In relation to the coastal environment:

(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, . . . are activities important to the social, economic and cultural well-being of people and communities.

(b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;

…

(d) recognise tāngata whenua needs for papakainga, marae and associated developments and make appropriate provision for them;

…

(h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;

(i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment;

(2) Additionally, in relation to the coastal marine area:

…

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

(d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there

Policy 15 Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

National Policy Statement on Electricity Transmission

5. Objective

To recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission resources to meet the needs of present and future generations, while:

• managing the adverse environmental effects of the network; and

• managing the adverse effects of other activities on the network.

7. Managing the environmental effects of transmission

Policy 2

In achieving the purpose of the Act, decision-makers must recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network.

Policy 3

When considering measures to avoid, remedy or mitigate adverse environmental effects of transmission activities, decision-makers must consider the constraints imposed on achieving those measures by the technical and operational requirements of the network.

Policy 4

When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.

Policy 5

When considering the environmental effects of transmission activities associated with transmission assets, decision-makers must enable the reasonable operational, maintenance and minor upgrade requirements of established electricity transmission assets.

Policy 6

Substantial upgrades of transmission infrastructure should be used as an opportunity to reduce existing adverse effects of transmission including such effects on sensitive activities where appropriate.

Policy 7

Planning and development of the transmission system should minimise adverse effects on urban amenity and avoid adverse effects on town centres and areas of high recreational value or amenity and existing sensitive activities.

Policy 8

In rural environments, planning and development of the transmission system should seek to avoid adverse effects on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities.

Bay of Plenty Regional Coastal Environment Plan

Issues of the RCEP

1.2 Natural Heritage

Issue 7 Māori cultural values, practices and mātauranga associated with natural character, natural features and landscapes and indigenous biodiversity are often not adequately recognised or provided for resulting in adverse effects on cultural values.

1.4 Iwi Resource Management

Issue 17 Ko te moana ko au, ko au ko te moana (I am the sea – the sea is me). Tangata whenua, as indigenous peoples, have rights protected by the Te Tiriti o Waitangi (the Treaty of Waitangi) and that consequently the RMA accords tangata whenua a status distinct from that of interest groups and members of the public.

Issue 19 Wāhi tapu and other sites of significance to tāngata whenua can be adversely affected by human activities and coastal erosion. Degradation of coastal resources and the lack of recognition of the role of tāngata whenua as kaitiaki of this resource can adversely affect the relationship of Māori and their ancestral lands, waters, sites, wāhi tapu and other taonga.

Issue 20 Māori have a world-view that is unique and that can be misunderstood, unrecognised and insufficiently provided for in the statutory decision-making process.

Issue 26 Policy 6 of the NZCPS recognises tangata whenua needs for papakainga, marae and associated developments in the coastal environment; but tangata whenua aspirations in relation to use, values

and development are not well understood, particularly in the coastal marine area.

1.8 Activities in the coastal marine area

Issue 40 The use and development of resources in the coastal marine area can promote social, cultural and economic wellbeing and provide significant social, cultural and economic benefits but may also cause adverse effects on the coastal environment.

Objectives of the RCEP

2.2 Natural Heritage

Objective 2 Protect the attributes and values of:

(a) Outstanding natural features and landscapes of the coastal environment; and

(b) Areas of high, very high and outstanding natural character in the coastal environment;

from inappropriate subdivision, use, and development, and restore or rehabilitate the natural character of the coastal environment where appropriate.

2.4 Iwi Resource Management

Objective 13 Take into account the principles of the Treaty of Waitangi and provide for partnerships with the active involvement of Tāngata whenua in management of the coastal environment when activities may affect their taonga, interests and values.

Objective 15 The recognition and protection of those taonga, sites, areas, features, resources, attributes or values of the coastal environment (including the Coastal Marine Area) which are either of significance or special value to tāngata whenua (where these are known).

Objective 16 The restoration or rehabilitation of areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms, mahinga mātaitai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.

Objective 18 Appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tāngata whenua or the relationship of tāngata whenua and their customs and traditions with the coastal environment.

2.8 Activities in the Coastal Marine Area

Objective 27 Activities and structures that depend upon the use of natural and physical resources in the coastal marine area, or have a functional need to be located in the coastal marine area are recognised and

provided for in appropriate locations, recognising the positional requirements of some activities.

Objective 28 The operation, maintenance and upgrade of existing regionally significant infrastructure, and transportation infrastructure that provides access to and from islands, is recognised and enabled in appropriate circumstances to meet the needs of future and present generations.

Policies of the RCEP

Natural Heritage (NH) Policies

Policy NH 4 Adverse effects must be avoided on the values and attributes of the following areas:

…

(b) Outstanding Natural Features and Landscapes (as identified in Schedule 3).

…

Policy NH 4A When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedules . . . 3 to this Plan . . :

(a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape . . .

(b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;

(c) Recognise the potential for cumulative effects that are more than minor;

(d) Have regard to any restoration and enhancement of the affected attributes and values, and

(e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

Policy NH 5 Consider providing for … use and development proposals that will adversely affect the values and attributes associated with the areas listed in Policy NH 4 where:

…

(a) The proposal:

(ia) Relates to the construction, operation, maintenance, protection or upgrading of the National Grid;

Policy NH 9A Recognise and provide for Māori cultural values and traditions when assessing the effects of a proposal on natural heritage, including by:

(a) Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;

(b) Assessing whether restoration of cultural landscape features can be enabled; and

(c) Applying the relevant Iwi Resource Management policies from this Plan and the RPS.

Policy NH 11

(1) An application for a proposal listed in Policy NH 5(a) must demonstrate that:

(b) There are no practical alternative locations available outside the areas listed in Policy NH 4; and

(b) The avoidance of effects required by Policy NH 4 is not possible; and

…

(d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and

(e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

Iwi Resource Management (IW) Policies

Policy IW 1 Proposals which may affect the relationship of Māori and their culture, traditions and taonga must recognise and provide for:

(a) Traditional Māori uses, practices and customary activities relating to natural and physical resources of the coastal environment such as mahinga kai, mahinga mātaitai, wāhi tapu, ngā toka taonga, tauranga waka, taunga ika and taiāpure in accordance with tikanga Māori;

(b) The role and mana of tāngata whenua as kaitiaki of the region's coastal environment and the practical demonstration and exercise of kaitiakitanga;

(c) The right of tāngata whenua to express their own preferences and exhibit mātauranga Māori in coastal management within their tribal boundaries and coastal waters; and

(d) Areas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements, iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumatua; and.

(e) The importance of Māori cultural and heritage values through methods such as historic heritage, landscape and cultural impact assessments.

Policy IW 2 Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity.

Policy IW 5 Decision makers shall recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

Policy IW 8 Tāngata whenua shall be involved in establishing appropriate mitigation, remediation and offsetting options for activities that have an adverse effect on areas of significant cultural value (identified in accordance with Policy IW 1(d)).

Structures and Occupation of Space (SO) Policies

Policy SO 1 Recognise that the following structures are appropriate in the coastal marine area, subject to the Natural Heritage (NH) Policies, Iwi Resource Management Policy IW 2 and an assessment of adverse effects on the location:

…

(c) Structures associated with new and existing regionally significant infrastructure…

Policy SO 2 Structures in the coastal marine area shall:

(a) Be consistent with the requirements of the NZCPS, in particular Policies 6(1)(a) and 6(2);

(b) Where relevant, be consistent with the National Policy Statement on Electricity Transmission;

Schedule 3 of the RCEP identifies areas of Outstanding Natural Features and Landscapes (ONFL) using the criteria of Policy 15(c) of the NZCPS and Appendix F, set 2 to the RPS.

Te Awanui Harbour, Waimapu Estuary & Welcome Bay – ONFL 3

Description:

Tauranga Harbour is a shallow tidal estuary of 224 km². At low tide, 93% of the seabed is exposed. The harbour and its estuarine margins comprise numerous bays,
estuaries, wetland and saltmarsh. The key attributes which drive the requirement for classification as ONFL, and require protection, relate to the high natural science
values associated with the margins and habitats; the high transient values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns.

Current uses:

Bridges, national grid infrastructure, wharves, moorings, residential development, boardwalks, stormwater and sewer infrastructure, boat ramps, reclamations,
recreational activities such as water skiing, fishing, boating, channel markers, navigational signs.

Evaluation of Māori values: Medium to High

Ancient pa, mahinga kai, wāhi tapu, kāinga, taunga ika.

Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.

Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

Schedule 6 of the RCEP identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi - known as "*Mai i ngā Kurī a Whārei ki Wairakei*." Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land.

Maintenance of kaimoana and coastal water quality is particularly important.

…

Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.

Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

Bay of Plenty Regional Policy Statement (RPS)

Policy IW 2B: Recognising matters of significance to Māori

Proposals which may affect the relationship of Māori and their culture and traditions must:

(a) Recognise and provide for:

(i) Traditional Māori uses and practices relating to natural and physical resources such as mahinga mātaitai, waahi tapu, papakāinga and taonga raranga;

(ii) The role of tangata whenua as kaitiaki of the mauri of their resources;

(iii) The mana whenua relationship of tangata whenua with, and their role as kaitiaki of, the mauri of natural resources;

(iv) Sites of cultural significance identified in iwi and hapū resource management plans; and

(b) Recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act

Exercise the functions and powers of local authorities in a manner that:

(a) Takes into account the principles of the Treaty of Waitangi;

(b) Recognises that the principles of the Treaty will continue to evolve and be defined;

(c) Promotes awareness and understanding of councils' obligations under the Act regarding the principles of the Treaty, tikanga Māori and

kaupapa Māori, among council decision makers, staff and the community;

(d) Recognises that tangata whenua, as indigenous peoples, have rights protected by the Treaty and that consequently the Act accords iwi a status distinct from that of interest groups and members of the public; and

(e) Recognises the right of each iwi to define their own preferences for the sustainable management of natural and physical resources, where this is not inconsistent with the Act.

Policy IW 4B: Taking into account iwi and hapū resource management plans

Ensure iwi and hapū resource management plans are taken into account in resource management decision making processes.

Policy IW 5B: Adverse effects on matters of significance to Māori

When considering proposals that may adversely affect any matter of significance to Māori recognise and provide for avoiding, remedying or mitigating adverse effects on:

(a) The exercise of kaitiakitanga;

(b) Mauri, particularly in relation to fresh, geothermal and coastal waters, land and air;

(c) Mahinga kai and areas of natural resources used for customary purposes;

(d) Places sites and areas with significant spiritual or cultural historic heritage value to tangata whenua; and

(e) Existing and zoned marae or papakāinga land.

Policy IW 6B: Encouraging tangata whenua to identify measures to avoid, remedy or mitigate adverse cultural effects

Encourage tangata whenua to recommend appropriate measures to avoid, remedy or mitigate adverse environmental effects on cultural values, resources or sites, from the use and development activities as part of consultation for resource consent applications and in their own resource management plans.

Tauranga City Plan (the District Plan)

Objectives

Objective 6A.1.3 The natural character of the City's coastal environment, wetlands, rivers and streams is preserved and protected from inappropriate subdivision, use and development.

Objective 6A.1.7 The landscape character values of the City's harbour environment is maintained and enhanced.

Objective 6A.1.8 The open space character of the coastal marine area and the factors, values and associations of outstanding natural features and landscapes and important amenity landscapes and their margins is maintained and enhanced.

Objective 10A.3.3 Construction, Operation and Maintenance of Network Utilities

a) The construction (and minor upgrading in relation to electric lines) of network utilities avoids or mitigates any potential adverse effects on amenity, landscape character, streetscape and heritage values;

b) The operation (and minor upgrading in relation to electric lines) and maintenance of network utilities mitigates any adverse effects on amenity, landscape character, streetscape and heritage values.

Policies

Policy 6A.1.7.1 By ensuring that subdivision, use and development along the margins of Tauranga Harbour does not adversely affect the landscape character values of that environment by:

…

g) Protecting areas of cultural value;

h) Avoiding built form of a scale that dominates the harbour's landscape character;

i) Siting buildings, structures, infrastructure and services to avoid or minimise visual impacts on the harbour margins environment;

…

m) Ensuring activities maintain and enhance the factors, values and associations of outstanding natural features and landscapes and/or important amenity landscapes.

Policy 6A.1.8.1 By ensuring that buildings, structures and activities along the margins of the coastal marine area, outstanding natural features and landscapes and important amenity landscapes do not compromise the natural character, factors, values and associations of those areas, through:

a) The impact of the bulk and scale of buildings, structures and activities on the amenity of the environment;

…

d) Buildings, structures and activities detracting from the existing open space character and the factors, values and associations of outstanding natural features and

landscapes and important amenity landscapes and their margins;

Policy 7C.4.3.1 By ensuring that subdivision, use and development maintains and enhances the remaining values and associations of Group 2 Significant Maori Areas by having regard to the following criteria:

a) The extent to which the degree of destruction, damage, loss or modification associated with the activity detracts from the recognised values and associations and the irreversibility of these effects;

b) The magnitude, scale and nature of effects in relation to the values and associations of the area;

c) The opportunities for remediation, mitigation or enhancement;

d) Where the avoidance of any adverse effects is not practicable, the opportunity to use alternative methods or designs that lessen any adverse effects on the area, including but not limited to the consideration of the costs and technical feasibility of these.

Policy 10A.3.3.1 Undergrounding of Infrastructure Associated with Network Utilities

By ensuring infrastructure associated with network utilities (including, but not limited to pipes, lines and cables) shall be placed underground, unless:

a) Alternative placement will reduce adverse effects on the amenity, landscape character, streetscape or heritage values of the surrounding area;

b) The existence of a natural or physical feature or structure makes underground placement impractical; c) The operational, technical requirements or cost of the network utility infrastructure dictate that it must be placed above ground;

d) It is existing infrastructure.

Policy 10A.3.3.2 Effects on the Environment

By ensuring that network utilities are designed, sited, operated and maintained to address the potential adverse effects:

a) On other network utilities;

b) Of emissions of noise, light or hazardous substances;

c) On the amenity of the surrounding environment, its landscape character and streetscape qualities;

d) On the amenity values of sites, buildings, places or areas of heritage, cultural and archaeological value.

Objective 10B.1.1 Electricity Transmission Network

The importance of the high-voltage transmission network to the City's, regions and nation's social and economic wellbeing is recognised and provided for.

Policy 10B.1.1.1 Electricity Transmission Network

By providing for the sustainable, secure and efficient use and development of the high-voltage transmission network within the City, while seeking that adverse effects on the environment are avoided, remedied or mitigated to the extent practicable, recognising the technical and operational requirements and constraints of the network.

The Tauranga City Plan identifies Te Ariki Pā/Maungatapu as a significant Māori area of Ngāti Hē (Area No M41). Its values are recorded as:

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu/Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa/ Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

Iwi Management Plans

The Te Awanui Tauranga Harbour Iwi Management Plan 2008

> OBJECTIVE
>
> 1. To reduce the impacts on cultural values resulting from infrastructural development in, on or near Te Awanui.
>
> POLICIES
>
> 1. To restrict the placement of structures in, on or near Te Awanui, and to promote the efficient use of existing structures around Te Awanui.
>
> …
>
> 8. To avoid adverse effects on culturally important areas, including waterways and cultural important landscape features as a result of works, including the storage and or disposal of spoil as a product of works.

…

10.Iwi object to the development of power pylons in Te Awanui, appropriate alternative routes need to be investigated in conjunction with tāngata whenua.

The Tauranga Moana Iwi Management Plan 2016-2026

15.1 Oppose further placement of power pylons on the bed of Te Awanui (Tauranga Harbour).

15.2 Pylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge.

…

15.4 In relation to the placement, alteration or extension of structures, within Tauranga Moana:

(a) Ensure that:

(i) tāngata whenua values are recognised and provided for.

…

(b) Avoid adverse effects on sites and areas of cultural significance, wetlands or mahinga kai areas.

Ngāi Te Rangi Resource Management Plan

All environmental activities that take place within the rohe of Ngaiterangi must take into account the impact on the cultural, social, and economic survival of the Ngaiterangi hapu.

…

The cultural significance of Ngaiterangi's links to their lands and the values they hold in respect of land, whether still in customary title or not, should be acknowledged and respected in all resource management activities.

…

Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities – Maori and non Maori – shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.

…

Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.